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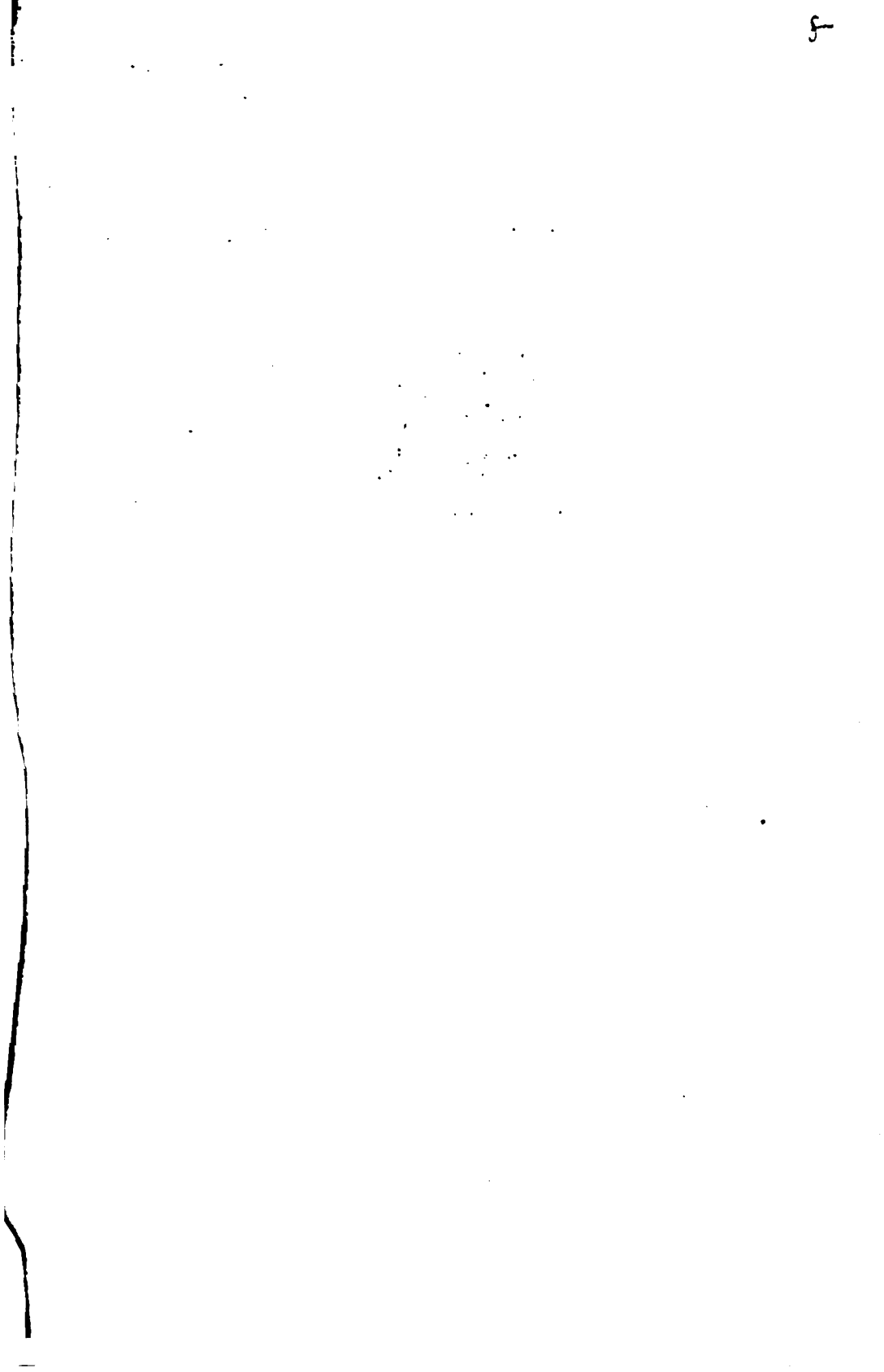
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REPORTS
OF
CASES AT LAW AND IN EQUITY
DETERMINED BY THE
SUPREME COURT
OF THE
STATE OF IOWA

JANUARY AND MAY TERMS, 1920.

BY
U. G. WHITNEY
REPORTER

VOLUME 188

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1921

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By
STATE OF IOWA

SEP 9 1921

JUDGES OF THE SUPREME COURT

SILAS M. WEAVER, Chief Justice, Hardin County.

SCOTT M. LADD, O'Brien County.

WILLIAM D. EVANS, Franklin County.

***FRANK R. GAYNOR**, Plymouth County.

BYRON W. PRESTON, Mahaska County.

BENJAMIN I. SALINGER, Carroll County.

TRUMAN S. STEVENS, Fremont County.

†**THOMAS ARTHUR**, Harrison County.

OFFICERS OF THE COURT.

H. M. HAVNER, *Attorney General*, Iowa County.

B. W. GARRETT, *Clerk*, Decatur County.

U. G. WHITNEY, *Reporter*, Woodbury County.

*Died August 3, 1920.

†Appointed September 15, 1920.

JUDGES OF THE COURTS

JANUARY 1, 1921.

DISTRICT COURTS

- First District*, two judges—WILLIAM S. HAMILTON, Ft. Madison; JOHN E. CRAIG, Keokuk.
- Second District*, four judges—C. W. VERMILION, Centerville; D. M. ANDERSON, Abia; F. M. HUNTER, Ottumwa; SENECA CORNELL, Ottumwa.
- Third District*, three judges—HIRAM K. EVANS, Corydon; HOMER A. FULLER, Mt. Ayr; P. C. WINTER, Creston.
- Fourth District*, three judges—GEORGE JEPSON, Sioux City; W. G. SEARS, Sioux City; C. C. HAMILTON, Sioux City.
- Fifth District*, three judges—J. H. APFLEGATE, Guthrie Center; LORIN N. HAYS, Knoxville; H. S. DUGAN, Perry.
- Sixth District*, three judges—CHAS. A. DEWEY, Washington; D. W. HAMILTON, Grinnell; H. F. WAGNER, Sigourney.
- Seventh District*, five judges—A. J. HOUSE, Maquoketa; ARTHUR P. BARNER, Clinton; WILLIAM THEOPHILUS, Davenport; MAURICE DONEGAN, Davenport; F. D. LETTS, Davenport.
- Eighth District*, two judges—R. G. POPHAM, Marengo; RALPH OTTO, Iowa City.
- Ninth District*, five judges—HUBERT UTTERBACK, Des Moines; JOSEPH E. MEYER, Des Moines; LESTER L. THOMPSON, Des Moines; JOHN D. WASHINGTON, Des Moines; JAMES C. HUME, Des Moines.
- Tenth District*, three judges—H. B. BOIES, Waterloo; E. B. STILES, Manchester; GEORGE W. WOOD, Waterloo.
- Eleventh District*, four judges—R. M. WRIGHT, Ft. Dodge; H. E. FRY, Boone; EDWARD M. MCCALL, Nevada; G. W. THOMPSON, Webster City.
- Twelfth District*, three judges—C. H. KELLEY, Charles City; J. J. CLARK, Mason City; M. F. EDWARDS, Parkersburg.
- Thirteenth District*, two judges—WILLIAM J. SPRINGER, New Hampton; H. E. TAYLOR, Waukon.
- Fourteenth District*, three judges—D. F. COYLE, Humboldt; N. J. LEE, Estherville; JAMES DE LAND, Storm Lake.
- Fifteenth District*, five judges—ORVILLE D. WHEELER, Council Bluffs; EUGENE B. WOODRUFF, Glenwood; JOSEPH B. ROCKAFELLOW, Atlantic; EARL PETERS, Clarinda; GEORGE W. CULLISON, Harlan.
- Sixteenth District*, two judges—M. E. HUTCHISON, Lake City; E. G. ALBERT, Jefferson.
- Seventeenth District*, two judges—B. F. CUMMINGS, Marshalltown; JAMES W. WILLETT, Tama.
- Eighteenth District*, four judges—F. O. ELLISON, Adamosa; MILO P. SMITH, Cedar Rapids; JOHN T. MOFFIT, Tipton; F. F. DAWLEY, Cedar Rapids.
- Nineteenth District*, two judges—JOHN W. KINTZINGER, Dubuque; D. E. MAQUIRE, Dubuque.
- Twentieth District*, two judges—JAMES D. SMYTH, Burlington; OSCAR PALE, Wapello.
- Twenty-first District*, two judges—WILLIAM HUTCHINSON, Alton; C. C. BRADLEY, Le Mars.

SUPERIOR COURTS

- Cedar Rapids*—ATHERTON B. CLARK.
- Council Bluffs*—FRANK J. CAPELL.
- Grinnell*—J. H. P. ROBINSON.
- Keokuk*—W. L. McNAMARA.
- Oelwein*—JAY COOK.
- Perry*—W. W. CARDELL.*
- Shenandoah*—FREDERICK FISCHER.

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- Clinton*, one judge—F. M. FORT.
- Des Moines*, four judges—W. G. BONNER; O. S. FRANKLIN; J. E. MERSTON; T. L. SELLERS.
- Marshalltown*, one judge—B. O. TANKERSLEY.
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*Resigned, December 31, 1920.

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OF
CASES AT LAW AND IN EQUITY
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AT
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HENRY DEN ADEL, Appellee, v. CASUALTY COMPANY OF
AMERICA, Appellant.

**MASTER AND SERVANT: Workmen's Compensation Act—Nonap-
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juries under the Workmen's Compensation Act; and an insurer
who has agreed to pay "*any sum due or to become due*" from
the employer to his employees is bound by such agreement,
when he recognizes it by making part payment. It follows
that, in such case, the employee may, to protect his lien on the
bond, maintain a direct action against the insurer, irrespective
of the solvency of the employer. (See Secs. 2477-m25, 2477-m48,
Code Supp., 1913.)

Appeal from Polk District Court.—JOSEPH E. MEYER,
Judge.

JANUARY 20, 1920.

THE opinion sufficiently states the case.—*Affirmed.*
VOL. 188 IA.—1



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THE opinion sufficiently states the case.—*Affirmed.*
VOL. 188 IA.—1

Brammer, Seevers & Hurlburt, for appellant.

Brockett, Strauss & Shaw, for appellee.

WEAVER, C. J.—The petition, which is entitled in equity, is somewhat obscurely stated, but is, in substance, that, in May, 1915, the defendant Casualty Company issued to one Breuklander a policy of insurance against liability as an employer under the Workmen's Compensation Act of this state; that, while said policy was in full force and effect, the plaintiff, being the employee of said Breuklander, received severe and permanent injuries; that such injuries, so sustained by plaintiff, arose out of and in the course of his said employment; and that, by reason of such injuries, plaintiff became entitled to receive from his employer and the said Casualty Company the full sum of \$3,600. Of this sum it is alleged that the insurer has paid plaintiff the sum of \$507, but the remainder is still due and unpaid, and judgment is asked for recovery of the unpaid remainder. For the enforcement of such claim, the plaintiff asserts a lien in his favor, under the provisions of Section 2477-m48, Code Supplement, 1913, on whatever amount may be or become due from the insurer to the insured, which lien he prays may be established and enforced, to the amount of the judgment which may be recovered by him.

A copy of the policy of insurance issued by the defendant is attached to the petition. By its terms, the company assumes and agrees to pay "any sum due or to become due" from the employer on account of personal injuries sustained by his employees, the obligation for which compensation is imposed upon said employer by the Workmen's Compensation Act.

The defendant demurred to the petition, assigning as grounds therefor: (a) that it fails to state a cause of action; (b) that there is no privity of contract between plaintiff and defendant; (c) that it does not allege any arbitra-

tion or allowance of plaintiff's claim under the provisions of the statute; (d) that, under the statute, action or proceedings to enforce collection of compensation must be begun before the industrial commission of the state; (e) that there is no allegation that the employer has failed or refused to pay the compensation, if any, to which plaintiff claims to be entitled; and (f) that there is no allegation that the employer is insolvent, or that there is any other reason for a direct action against the insurer.

The demurrer was overruled, February 2, 1918. The record of the ruling is followed by a notation that "defendant excepts;" but later, on March 19, 1918, defendant filed a motion to strike the petition from the files and dismiss the case upon grounds which are quite identical with those which had been before assigned in support of the demurrer overruled, as above stated. Subject to this motion, defendant further moved the court for an order requiring the plaintiff to make his petition more specific in several particulars. This motion was denied generally, to which ruling also defendant excepted. Thereafter, on April 10, 1918, defendant was held to be in default for want of answer to the petition, and judgment was entered for plaintiff substantially as demanded. The defendant appeals.

I. The appellant's principal contentions may be abbreviated as follows: That there is no direct or original liability of the Casualty Company to the employee, and that the only method by which the employee may obtain the benefit of the insurance taken out by the employer is by proceedings initiated before the state industrial commission. If the case presented by the plaintiff did no more than to disclose the relation of employer, employee, and insurer, and the employee's injury, arising out of and in the course of his employment, the position taken by appellant could well be sustained; but the petition demurred to is not thus limited. The statute does not inhibit an agreement between

parties for settlement without a hearing before the commissioner or board of arbitrators.

By Sections 2477-m25 and 2477-m26, the employer and employee may agree upon terms of settlement, subject to the approval of the commissioner; and it is only when no such settlement is reached that the employee is required to institute proceedings before that officer. And if an agreement is reached, and the insurer sees fit to act thereon, and does, in fact, pay the stipulated sum, without first referring the matter to the commissioner for approval, we see no good reason why it should not be bound thereby. With reference to the position of the Casualty Company in these transactions, it is to be noted that its policy is not an ordinary agreement of indemnity, by which the employer, after adjudication of the claims against him, may call upon the insurer to make good the loss. To be sure, the measure of the insurer's obligation is the amount for which the employer is liable to the employee, but such obligation is not that of mere surety. For the premium paid, the company assumes direct and primary liability—not simply to the employer, as a reimbursement for losses sustained, but to the employee, to pay “any sum due or to become due” from the employer to his employee for injuries for which the latter is entitled to compensation under the Workmen's Compensation Act, and, at its own expense, to defend all suits and other proceedings brought against the employer on account of injuries alleged to have been sustained by an employee. To all ordinary intents and purposes, the proceedings in and out of court on account of claims of this kind are carried on, so far as the employer is concerned, under the direction and control of the insurer. It is the insurer who settles, if a settlement is agreed upon; it is the insurer who pays, if payment be made; and it is the insurer who defends, if the matter be litigated, and pays all costs and expenses so incurred. If such insurer finds or believes it advisable to settle a claim, and,

terms being agreed upon, it pays the amount, it cannot thereafter be heard to deny the binding character of the agreement; and, if it recognizes the obligation assumed in such settlement by part payment of the agreed amount, we think it is equally estopped to deny its liability for the unpaid remainder. We are not to be understood, however, as holding that failure to refer the matter to the adjudication of the commissioner may not be pleaded as a defense.

Now, it is true that the petition, as we said at the outset, is not as clear or specific as could be wished, and does not, in extended or specific terms, allege such settlement; but such, we think, is the substance and effect of the pleading, and it does allege or admit part payment by the defendant. Under such circumstances, why may not plaintiff have an action directly against the insurer for the unpaid remainder? The promise to pay is the insurer's promise, and the debt is its debt.

The plaintiff is not required to allege or prove the insolvency of the employer; for, as we have already said, the insurer has, for value received, assumed and undertaken to be responsible for all the claims of employees for compensation under the statute, without regard to the solvency or insolvency of the employer. Nor is it a ground for demurrer, if it be true, that plaintiff's right of action, if any, is at law, and not in equity. Code Sections 3426, 3432.

There are features of the case which are not entirely free from difficulty; but we are of the opinion that the trial court did not err in overruling the demurrer and motion to strike.

II. Some question is raised by appellee that defendant waived its right to have a review of the ruling upon the demurrer, because it did not expressly elect to stand upon the demurrer, but thereafter moved to strike the petition, and to make it more specific, and, upon the denial of the motion, failed to answer; but, since we find that the peti-

tion is not vulnerable to the attack made upon it, a ruling upon this objection is not necessary to a disposition of the appeal, and we do not pass upon it.

For reasons stated, the judgment of the trial court is—
Affirmed.

LADD, GAYNOR, and STEVENS, JJ., concur.

BOARD OF SUPERVISORS OF POLK COUNTY et al., Appellants, v.
JULIA D. McDONALD, Appellee and Cross-Appellant.

BOARD OF SUPERVISORS OF POLK COUNTY et al., Appellants, v.
T. W. McDONALD, Appellee and Cross-Appellant.

BOARD OF SUPERVISORS OF POLK COUNTY et al., Appellants, v.
SUSANNA HAMILTON, Appellee and Cross-Appellant.

DRAINS: Assessment—Deference to Action of Board. The rule of
1 deference to the action of the board of supervisors in adjust-
ing assessments *presupposes* that the board has, with reason-
ably painstaking care, availed itself of all available and material
information bearing on an approximately just distribution of
burdens. The rule ceases when its presupposed basis is shown
not to exist. Record reviewed, and held to show that the as-
sessments fixed by the court were more accurate than those
fixed by the board.

DRAINS: Assessments—Approximate Accuracy. Principle recog-
2 nized that an approximately correct assessment is the best that
the court may hope to arrive at in threading its way through
the ordinary maze of conflicting estimates bearing on the rel-
ative amount of swamp, wet, and dry land in the various tracts.

DRAINS: Appeal—Decree Irrevocably Fixing Classification. The
3 district court, on appeal from assessments, may not decree that
the classification found by it to be correct shall be the basis
“for future assessments by way of improvements.” (See Sec.
1989-a12, Code Supp., 1913.)

Appeal from Polk District Court.—JOSEPH E. MEYER, Judge.

JANUARY 20, 1920.

. **APPEAL** in a drainage proceeding. Certain landowners, having appealed to the district court from drainage assessments made against them, obtained partial relief on such appeal. From the finding of the district court, all parties have appealed.—*Modified and affirmed.*

Don B. Shaw and *Oscar Strauss*, for appellants.

Fred F. Keithley and *E. D. Samson*, for appellees and cross-appellants.

EVANS, J.—I. The board of supervisors for the drainage district first appealed, and are, therefore, denominated appellants. These appellants have erroneously entitled the case, both in their abstract and in their brief, by reversing the name and place of “plaintiff” and “defendant.” This necessarily caused the case to be designated in this court under such erroneous title. Appellants thereby embedded their error into our records. To avoid further confusion in our own records, we entitle the case in the erroneous form in which it was designated by reason of the error of the appellants. The plaintiffs below were, in fact, the appealing landowners, and the defendants were the supervisors, as representing the drainage district. The title thus established in the district court should have been preserved here, and the case designated accordingly.

The drainage district involved is known as No. 21 of Polk County. It includes agricultural lands contiguous to the city corporation of Des Moines, town lots within the city, and railway right of ways. The parties complaining of the original assessments are Julia McDonald, T. W. McDonald, and Susanna Hamilton. They are owners of some of the agricultural lands in the district. Julia McDonald

was assessed for benefits on three tracts, of approximately 40 acres each, as follows, respectively: \$2,343.75, \$3,012.50, \$332.50. On appeal, the district court reduced her assessments respectively to \$1,781.25, \$2,407.50, \$268.75. Susanna Hamilton was assessed with \$4,390 as benefit to 38 acres, and this was reduced, on appeal, to \$3,790. T. W. McDonald was assessed on 1½ acres at \$93.75, which was reduced, on appeal, to \$46.88.

It is the contention for the supervisors that the decree of the district court was erroneous, in that it failed to confirm the assessment made by the supervisors as being equitable. It is contended for the landowners that the decree is erroneous in that it failed to give them sufficient relief.

The questions involved are purely fact questions. The general facts pertaining to the district and the establishment thereof are set forth quite fully in the companion case of *Interurban R. Co. v. Board of Supervisors*, 175 N. W. 743, and reference may be had thereto for such facts. It perhaps ought to be conceded that the engineering scheme adopted for this improvement was ill-advised, and more expensive than a better scheme would have been. Instead of following the general course of natural drainage, which was in the shape of an ox-bow, the engineering plan cut across through high ground, which involved a cut 17 feet deep, and an average depth of 14½ feet for a distance of half a mile. Needless to say, such half mile was very expensive, and served no special function of benefit to the high land through which it cut. But such plan was presented and published and adopted without objection by any of the interested parties. It is, therefore, beyond the reach of condemnation herein.

As to the accuracy of the amounts fixed as benefits by the decree of the district court, we can give only a cursory consideration. The record is not in a condition to permit more. In the making of the record below, an appeal was

evidently not in the contemplation of the parties. The witnesses testified with plats and maps before them as exhibits. They testified that the ground was "low here" and "high there." The exhibits thus used are omitted from the record here. There was no attempt at preserving the meaning of such testimony upon the printed page. We do not, therefore, have all the testimony before us. To add to the confusion of the record, the appellants have not only erroneously entitled the case, by representing the plaintiffs as defendants and the defendants as plaintiffs, but they have failed to separate in their abstract the evidence of "plaintiffs" from the evidence of "defendants." The evidence of witnesses "for the the defendant" has been scattered here and there, pell-mell, through the evidence of witnesses "for the plaintiff," each witness being designated as "for the plaintiff" or "for the defendant." When a witness is designated therein as "for the plaintiff," we have no way to discover whether reference is thereby had to appellants' own title of the case or to the title as it ought to have been, as appears by later amendment of the appellees. Nor does appellants' index throw any light on the question.

Giving to the record, however, as full consideration as its condition will permit, some facts stand forth which require our consideration.

It is true, as contended by appellant, that we are slow to interfere with the findings and assessments of the board of supervisors, who, through their commissioners, are in the best position to do, if they will, exact

1. DRAINS: assessment: deference to action of board. justice between the beneficiaries of the improvements. But this rule of deference is not intended to encourage laxity of consider-

ation, or to put a premium upon guesswork. We adhere to this rule the more readily where it is made to appear that the board, through its commissioners, was painstaking and careful in its investigation, and that it availed itself with

reasonable accuracy of all the information material to a just apportionment of the burden. This means that, if land is to be classified as 100 per cent, 80 per cent, or 50 per cent, according to its character as swampy, or wet, or low, or high and dry, then reasonable means of accuracy should be adopted as the basis of the estimates upon which such classification is based. There ought to be some degree of measurement of areas and of levels or elevations. In this case, we are impressed, from the record, that the commissioners did not avail themselves sufficiently of means of accuracy. They took no measurements. All distances and dimensions and levels were a mere estimate of the eye, and a compromise of differences in estimates. Manifestly, such estimates, however skillfully done, are subject to substantial error.

At the trial in the district court, the litigants used as witnesses expert drainage engineers, who had gone upon the ground with their instruments, and who exhibited their measurements with their testimony. The trial court was, therefore, justified in believing the work of such engineers to be more accurate than the work of the commissioners, making due allowance, in the weighing of their testimony, for the fact that such witnesses might be more or less partisan, whereas the commissioners were presumably wholly free in that regard.

Except in one respect, to be hereinafter stated, we do not feel justified in interfering with the finding of the district court on the appeal of the supervisors.

II. We turn to the appeal of Susanna Hamilton. She was the owner of a 40-acre tract, less 2 acres for highway, which was deemed by the commissioners to be the most

greatly benefited of any similar tract in the district. It was, therefore, adopted as the "100 per cent forty," and was made the standard of comparison for all other tracts. Af-

2. DRAINS :
assessments :
approximate
accuracy.

ter fixing the comparative percentage of benefit of each tract in the district, the commissioners found, by computation, that one acre, classified as 100 per cent, would call for assessment of benefit of \$125. The assessment upon the 38 acres was fixed at \$4,390. Such assessment was reduced in the district court to \$3,790. It is now contended for Mrs. Hamilton that such reduced assessment is still too high. The evidence in her behalf consists largely of a comparison between her tract and certain tracts of Julia McDonald and of Dicks and of Peterson. Evidence was also introduced to show that the tract had upon it more acreage of dry land than was indicated by the estimates of the commissioners, and that it could not be classified at 100 per cent.

It is first to be said that a classification of a tract at 100 per cent does not require, as a basis therefor, a complete absence of dry land from such tract. The case of cross-appellant is argued somewhat upon the theory that only tracts which are *wholly* swampy or wet can be classified at 100 per cent. There is a certain practical sense in which this is true. On the other hand, the theory of the classification is that the percentage fixed upon a tract is comparative only. Theoretically, "100 per cent" is adopted as the starting standard, and applies to the *wettest* tract, and from this standard the percentages of the other tracts are scaled. It is not theoretically necessary that the tract selected as the 100 per cent tract should be as extensively or thoroughly wet as is the 100 per cent tract in some other district. It is only necessary that it shall represent the maximum in the particular district. If it does fairly represent the maximum, then the fact that the tract may have more or less dry acreage does not forbid its classification at 100 per cent. As a matter of practical convenience in the making of estimates and comparisons, it is undoubtedly desirable that the area selected for the 100

per cent classification should be virtually uniform in character as wholly wet. In selecting a 40-acre tract as the standard, it is often true that it contains more or less dry area, and that this should be considered in the comparison for classification. As a practical fact, in spite of theory, commissioners do make allowance for such dry area, and did so in this case. Though they denominated it the 100 per cent forty, yet, because of the dry area thereon, they reduced this maximum percentage, and assessed on the basis of about 90 per cent. They said, in effect, that they did confine the 100 per cent classification to the area actually wet, and that there was no 40-acre tract in the district which they classified entirely at this maximum.

It stands conceded, therefore, that not all the acreage of the Hamilton 40-acre tract should be classified at 100 per cent, and that it was not so classified. The effect of the decree in the district court was to give it an average classification of about 80 per cent. The conflict in the evidence is over the question of how many acres of wet and dry land, respectively, are contained within the tract. The cross-appellant presented expert engineers as witnesses. These engineers presented their measurements and computations, and testified with marked candor. Their estimates were that the assessments on this tract should have been approximately \$3,200. This would reduce the classification to less than 70 per cent. The assessment would be about \$600 less than that fixed by the trial court. If the proper amount of assessment could be fixed with certainty as a mere matter of computation, the figures of these engineers would be persuasive. But even though the engineers went upon the ground, and made their measurements accurately, the fact remains that they had to select their points and lines from which they made such measurements. The demarcation between the "wet" and "dry" areas upon this tract was not a mere *line*, without dimensions, which could

be selected with certainty for the purpose of measurement. On the contrary, it was a *zone* of substantial and varying width. The selection of the starting point within this zone for the purpose of measurement was a mere matter of judgment and estimate. This zone is, in reality, the zone of dispute in the conflicting evidence. The computations of the witnesses pro and con may be readily reconciled, but their judgments and estimates which furnish the basis of their computations are more wide apart, and cannot be reconciled. Some of the dry area found by the experts of the cross-appellant is in the midst of the swampy area. Needless to say, a small acreage of dry land surrounded with swamp is, in a practical sense, the equivalent of the swamp, and a part of it. The trial court seems to have found the median line between the conflicting estimates, and allowed the cross-appellant about one half of the relief which her engineers computed as her due. We cannot say, upon this record, that such finding of the district court is not approximately correct. In this class of cases, approximation is the best the courts can do. We reach the conclusion, therefore, that there is no such showing upon this record as to justify our interference with the decree on the appeal of this cross-appellant.

III. We pass to the cross-appeal of Julia McDonald. Assessments upon three of her tracts are involved. Two of these were very wet tracts, but received a somewhat better classification than did the tract of Susanna Hamilton. Much that we have already said in the foregoing division is equally applicable here. In the argument of this cross-appeal, much stress is laid upon the failure to assess more heavily the higher lands included in the district. We have no jurisdiction to increase the assessments on such lands. If we were to find, however, that they were not bearing their fair share of the burden, it would necessarily follow that an undue share fell somewhere else. It quite goes without

saying that the manifest benefit of underground drainage goes to the servient lands, and that they should, in justice, bear the substance of the burden; and this is especially so where such servient lands are of such topography that they retain standing water. These are the lands whose benefits from drainage are so apparent and tangible that the owners petition for the establishment of a drainage district. Drainage benefits to high lands, the topography of which is such as to cast off all surface water, is not apparent, or even discernible, to the average owner thereof, and he never, or at least seldom, appears as a petitioner for a drainage district.

It appears from the evidence herein, in a very indefinite way, that the high lands in this drainage district are very high, and more or less sandy. For aught that appears, the presence of water is the least of their troubles. The evidence does not deal otherwise with description of these high lands and of their condition, as bearing on the question of drainage benefits. The cross-appellant introduced the opinion evidence of witnesses that these lands ought to have been assessed at a higher percentage. Such is the evidence upon which she relies for a modification of the decree on this ground. We think the evidence is not sufficient in its details to warrant any interference on our part in this regard. The same may be said as to the alleged insufficiency and absence of assessments of railroad right of ways.

We reach the conclusion here, also, that the record will not justify us in granting this cross-appellant more relief than she obtained in the district court.

IV. The cross-appeal of T. W. McDonald has somewhat the appearance of a tail which is following the hide. McDonald was the owner of an acre and a half. Most of it was comparatively dry, though some of it was sour. It was surrounded with swamps. The commissioners as-

essed the benefits at \$93.75. The decree of the trial court found the benefits to be \$46.88. It is claimed that this amount is still too high. The finding has the merit of being definite and exact. Against such a finding, we should be slow to interpose the guesswork of round numbers. If we should reduce this assessment to \$40.00, we should be unable to say, from the evidence in this record, why we cut off the \$6.88. If one amount be actually correct, the other is approximately so. It is not practicable for an appellate court, upon a printed and abstracted record, to correct the amount of a finding below which is so near the line of approximation.

We reach the conclusion, therefore, that this diminutive appeal must go out in the same caudal order as it came in.

V. We revert to the appeal of the supervisors. The decree entered below provided that the classifications therein found should be the basis, not only of present assessments of benefits, but "for future assessments by way of improvements." Complaint is made of this provision, as one of the grounds of reversal. Is this a proper provision to embody in the decree?

2. DRAINS: appeal: decree irrevocably fixing classification.

Section 1989-a12, Code Supplement, 1913, provides:

"This classification when finally established shall remain as a basis for all future assessments connected with the objects of said levee or drainage district, unless the board, for good cause, shall authorize a revision thereof."

The provision of the decree complained of was probably intended as a response to the statute as here quoted. No question pertaining to future assessment is here presented. There is, therefore, no such question to be adjudicated. The statute would speak without any aid from the decree. Under the statute, the classification adopted becomes presumptively the appropriate classification for fu-

ture assessments for improvements. But it is presumptive only. The statute preserves to the supervisors the power to make a different classification for future improvements, if "good cause" appear therefor. The needed future improvement might be such as to render marked benefit to one or to some, and comparatively little to others, regardless of benefits received from the original improvement. For instance, we have held that, where the improvement consists of a deepening and extending of a shallow outlet, the principal benefit of such improvement inures to those lands nearest the original outlet, even though they had been classified as receiving little benefit from the original improvements, because of the shallow outlet and their proximity thereto. *Christenson v. Board of Supervisors*, 179 Iowa 745; *Loomis v. Board of Supervisors*, 186 Iowa 721.

It is conceivable that just such a future improvement may be made in this drainage district. The statute on this subject not only has no need of aid from the decree; it is not aided by this provision thereof. If this provision of the decree can be deemed to have any force or effect, it is that it adjudicates the present classification irrevocably as a basis for future assessments for improvements of whatever kind. Its effect, therefore, is to bar the proper operation of the statute. This provision of the decree, wherever it appears therein, should, therefore, be stricken. To this extent, the decree below will be modified. In all other respects, it is affirmed on all appeals.—*Modified and affirmed.*

WEAVER, C. J., LADD, PRESTON, and SALINGER, JJ., concur.

NELLIE S. BUCHNER, Appellee, v. MARIETTE A. CANNELL et al., Appellants.

LIMITATION OF ACTIONS: Disavowal of Trust. The statute of limitations begins to run against a constructive trust from the

time the trustee clearly brings home to the *cestui* that the trust is disavowed and repudiated.

Appeal from Jackson District Court.—F. D. LETTS, Judge.

JANUARY 20, 1920.

THE trial court decreed appellant was, in law, a trustee, to pay appellee a sum of money given appellee by an ineffective codicil, and, therefore, defendant and appellant appeals.—*Reversed.*

C. W. Farr, W. H. Palmer, and J. E. E. Markley, for appellants.

H. M. McCaskrin and R. W. Olmsted, for appellee.

SALINGER, J.—I. T. E. Cannell made his will on July 7, 1873. On February 6, 1879, he attached the following codicil:

"To my adopted child Nellie S. Cannell, I wish to give \$5,000, when she is twenty-one years old. Having full confidence that my relatives will see this part of my will complied with, I do not get any witnesses to it. T. E. Cannell."

He died on February 16, 1889; and, on March 27th of that year, said will was admitted to probate. The plaintiff is an orphan. She came into the family of Cannell when of very tender years, and remained there at least until Mr. Cannell died; and she was at that time 17 years old. It may be assumed that Mr. Cannell and his wife treated plaintiff as their child. But plaintiff ultimately concedes, and the court found, that she was never adopted. It is admitted and found that the codicil, being unwitnessed, is not effective as a testament, and that plaintiff takes nothing by will. She bases her claims upon allegations that, between February 6, 1879, when the codicil was signed, and February 16, 1889, when Cannell died,

he and his wife, the defendant, had many conversations as to the \$5,000 provision in said codicil; that defendant, during all of said time, acquiesced in the same; that defendant impliedly and expressly promised her husband that she would honor said provision by paying plaintiff said sum out of such property as defendant would take under said original will, when plaintiff became twenty-one; that, after plaintiff reached that age, she frequently demanded of defendant that she perform this promise made to T. E. Cannell; that thereupon, defendant, said Mariette A. Cannell, promised plaintiff that she would pay the same; that, from time to time and year to year, up to four years ago, defendant promised to pay the same, promised that, when the plaintiff was old enough to take care of the money, defendant would give it to the plaintiff, promised to do what was right, and acknowledged that the \$5,000 was due and owing to plaintiff. It is further alleged that, later, the defendant refused, and still refuses, to pay the same, although the plaintiff has long since passed the age of 21 years, and although the defendant received property, both personal and real, from the estate of said Thomas E. Cannell, deceased, of value greatly in excess of \$5,000.

The prayer is that the court find and declare that said provision in said codicil, "under the intention of said testator and the promise of said defendant, created a trust fund of \$5,000 in favor of plaintiff, due to be paid to plaintiff by the defendant at the time when plaintiff should be 21 years old; that said Mariette A. Cannell holds the same as trustee for the plaintiff; that defendant be ordered forthwith to pay to plaintiff the sum of \$5,000, together with lawful interest upon the same from the date that plaintiff attained the age of 21 years; and for such other and further relief as may be adjudged equitable in the premises."

The decree impresses no trust, but finds that a trust

was created, and, upon that finding, entered a money judgment against appellant in \$5,000, with interest from June 19, 1893.

Defendant, for one answer, asserts laches, and alleges that the cause of action stated did not accrue at any time within 5 years preceding the commencement of plaintiff's action, and is, therefore, barred.

II. The suit was begun some 27 years after the death of T. E. Cannell, the maker of the so-called codicil. The arguments take a wide range. But, if the suit is barred by laches or the statute of limitations, there is an end. We will assume that plaintiff has not been guilty of laches, and may assume that her suit is on this head controlled by cases such as *Light v. West*, 42 Iowa 138, 141; *Cotton v. Wood*, 25 Iowa 44; and *Zunkel v. Colson*, 109 Iowa 695, 699. The testimony is mainly that of the parties, and is in flat conflict; and we are most gravely in doubt on whether plaintiff has proved the promises she alleges. But neither laches nor weakness of evidence needs extended consideration, if the statute of limitations stands in the way of a recovery. And to whether it does, we now address ourselves.

2-a

Proceeding by elimination, we have to say there is no plea that the statute is tolled, and there is no evidence of anything that could operate to toll it. The only thing that could be tortured into a written promise or recognition is presented by testimony of plaintiff, as a witness, that, near Christmas, in 1909, she received a letter from defendant, which she has destroyed. That letter enclosed a \$5 bill, and stated that the same was a small amount of the \$5,000 that plaintiff's father had left her. The defendant admits sending the \$5 bill, but says it was sent purely as a Christmas present. On the question of veracity as to the contents of the letter, to put it mildly, there is nothing in the

record upon which it can be held that plaintiff is more credible than defendant. Aside from that, the season at which the remittance was made, and its insignificant size, preclude the idea that it was treated by anyone as a payment on account of this \$5,000 claim. What is more, even upon the version of the plaintiff, the letter is not an admission that the defendant promised to pay the \$5,000 out of the property bequeathed to her by the will of her husband. Be all this as it may, there is, as said, no assertion in pleading that the statute was tolled. The theory of the defendant and of the trial court is that the statute never started to run, because defendant was a trustee, led plaintiff to believe that the trust was acknowledged by her, and made no clear disavowal and never clearly repudiated the trust until March, 1912, less than 5 years before plaintiff began this suit. The question whether the decree can be sustained, then, turns upon when there was a clear disavowal and repudiation.

Where, in constructive trusts, as between the parties the holding of the trustee is clearly adverse, and the equitable owner knew it, and there were circumstances which gave clear notice of the adverse attitude, both laches and the statute of limitations may be interposed. *Buttles v. DeBaun*, 116 Wis. 323. Indeed, it is elementary that the statute does run from the time the trustee clearly brings home to the *cestui* that the trust is disavowed and repudiated. Now, the plaintiff does testify that, up to March, 1912, the defendant made repeated promises, recognized the trust, and frequently made excuses for failing to execute it. All this the defendant denies. So far, the plaintiff fails to make out her case by a preponderance. This remains true unless, upon consideration of all the evidence, it may fairly be held that the testimony of the plaintiff in this respect has support, either by other and credible testimony, or by the circumstances disclosed by the evi-

dence. Instead of there being such supporting testimony, it is most clearly and affirmatively made to appear that notice of utter repudiation was clearly given the plaintiff long before March, 1912, and greatly more than 5 years before she brought this suit. In 1900, plaintiff was living in Chicago, and instituted a suit against defendant in which she filed a petition, verified by herself. In this petition she bases her claim under the codicil on the assertion that the codicil was written to pay her for her services as a servant in the Cannell family, and "for the purpose of paying her for her services and for the purpose of creating a trust upon the estate of Thomas E. Cannell for that purpose." The petition asserts that she has demanded payment, and that the defendants (this time five) "had notice and knowledge of the creation of the trust; that each of the five accepted the legacies under the will with the knowledge thereof, and impliedly, if not expressly, promised to pay petitioner said sum." She alleges further that she is 21 years old; has demanded payment from said trustees of said \$5,000 due her; and that defendants had refused and still refused to pay her the said sum; that it is due her, and she asks judgment against the defendants for that sum, and that the same be made a lien upon the property of the estate of Mr. Cannell, or such portion thereof as has been received and is now possessed by said defendants. On November 13, 1900, plaintiff filed in this cause an affidavit, sworn to on November 16th, in which she states that, after the death of Thomas E. Cannell, the defendant in this suit "refused to pay me any portion of the money which my father had trusted her with, or requested her to see paid me, and refused to longer provide me with a home or furnish me support." On June 4, 1901, plaintiff filed an amended and substituted petition, verified by her on May 28, 1901, this time eliminating the four other defendants, and retaining only the defendant in this suit. In this pe-

tition she alleges that Thomas E. Cannell and his wife, this defendant, both agreed to adopt the plaintiff; that they negligently, designedly, or fraudulently refused to adopt her according to law, which defeated her right to inherit; that Thomas E. Cannell made a will and gave his wife all his property, which was of the value of about \$30,000, during her life; that this will was admitted to probate, except a codicil, which was not probated or treated as any part of said will, because the codicil was not witnessed. The petition asserts that this created a trust; that defendant had full knowledge of the facts set forth; received the whole of the estate of her husband, well knowing that said estate was charged or to be charged, and so intended to be charged by the deceased, with payment to petitioner of the sum of \$5,000; and received the property charged with said trust, and expressly and impliedly received and now holds said property charged with said trust and the payment of said sum; that she has acknowledged the existence of the trust, and received said property in consideration of said trust, and charged therewith. It is further alleged that defendant has refused and still refuses to pay petitioner any portion of said sum of \$5,000, because said intended bequest was not duly witnessed so as to become a part of said original will; and that, in violation of the confidence reposed in her by said deceased, and for the purpose of cheating and defrauding the petitioner, and in fraud of the confidence in her by said deceased, insists that no portion of said intended bequest shall be given the petitioner. She avers further that she has arrived at the age of 21, and was of that age when she demanded the payment of said sum from defendant. She prays that the trust be established; that defendant be decreed to pay her said sum from the estate of deceased which defendant now enjoys, and that plaintiff have interest from the time she made demand.

On October 3, 1902, plaintiff filed amendment to pe-

tion, in which she alleges that, in November or December, 1897, she had a good and valid claim against the estate of T. E. Cannell, deceased, and against the present defendant, as administrator; that, about this time, she and defendant agreed, orally, that, if plaintiff would not make any claim against said estate, nor institute proceedings to enforce same, defendant would *personally* pay plaintiff the said sum of \$5,000. She alleges that she has performed this agreement on her part, and that defendant has failed and refused to pay her the said sum, or any other sum. On December 3, 1902, she filed an amendment to amendment, wherein she claims that Thomas E. Cannell willed all his property to defendant and appointed her administratrix; that she, plaintiff, possessed a valid claim against the estate, and was about to file it and to bring proceedings to enforce the same; that defendant was then in possession of a large part of the estate, as legatee; and that, to avoid this litigation, and to prevent petitioner from asserting said claim against the estate and the interest of the defendant in the estate, defendant orally agreed with plaintiff that, if the latter would not file said claim, and not seek to subject the interest of defendant to the payment of the claim, and put her to the trouble and expense of defending, that defendant would pay plaintiff the amount of her said claim, to wit, the sum of \$5,000, with interest; and that plaintiff did not file her claim. It is the fact, for whatever it may be worth, that, sometime in 1903, the suit instituted in 1900 was dismissed. It is not clear, nor do we think it very material, how it came to be dismissed.

It is made clear beyond discussion that, upon the sworn statements of the plaintiff, she was clearly advised, some 15 or 16 years before she instituted the present suit, that whatsoever claim the plaintiff was making against the defendant was being denied, and that whatever trust relation there might have existed was repudiated.

The plaintiff makes no claim in her pleadings that, while a repudiation may have been brought home to her as early as 1900 or 1901 or 1902, that thereafter the trust relationship was resumed, and that the resumed relation was not repudiated until 1912. The entire theory of the plaintiff's case is bottomed on the position that there was but one repudiation, and that it came so late as that the suit before us is not barred. We are abidingly satisfied that, not only has the plaintiff failed to prove that the repudiation came so late as that, but that it is overwhelmingly shown disavowal and repudiation were brought home to plaintiff so long before she instituted this suit as that the suit must be held to be barred by the statute of limitations.

It follows that the decree must be reversed. Decree will be entered here, dismissing the petition of the plaintiff.—*Reversed.*

WEAVER, C. J., EVANS and PRESTON, JJ., concur.

CITY OF DES MOINES, Appellant, v. DES MOINES WATER
COMPANY, Appellee.

HIGHWAYS: Obstructions—Standpipes of Water Company—Negli-

- 1 **gence.** A standpipe, connected with a mechanism for controlling the supply of water, which is erected in a public street, with the consent of the city and the private water company, and at the expense of the benefited property owner, but which, after erection, is within the *arbitrary control* of the water company, becomes a part of the equipment of the water company, with consequent primary liability on its part to maintain the pipe in such manner that the public will not suffer injury therefrom.

NEGLIGENCE: Protruding Water Pipe in Sidewalk. The act of a

- 2 water company in allowing a water pipe, originally flush with the sidewalk, to remain for two years some 2 or 3 inches above the sidewalk, owing to the gradual sinking of the walk, presents a jury question on the issue of the company's negligence.

MUNICIPAL CORPORATIONS: Primary and Secondary Negligence

3 —**Recovery.** A city which has paid damages consequent on its neglect to compel a public utility licensee to perform its implied *primary* duty to maintain its street equipment in a safe condition, may recover over against such licensee. Such facts do not present a case of joint tort-feasors.

MUNICIPAL CORPORATIONS: Sunken Walk. Negligence is not

4 established by a showing that a public walk was allowed, for several years, to remain in a slightly sunken condition, when it was not shown that such condition materially affected its solidity, safety, or usefulness.

Appeal from Polk District Court.—CHARLES A. DUDLEY,
Judge.

JANUARY 20, 1920.

ACTION at law to recover from defendant the amount of a judgment recovered against the plaintiff city in favor of one Lulu M. Overstreet, administratrix, on account of personal injuries sustained by her intestate, Archie P. Overstreet, such injury having been caused by a defect in a public sidewalk. The city, having paid the judgment, demands reimbursement from the water company, on the theory that the defect in the walk was due to the neglect of the water company in the maintenance of a so-called "stop box" and pipe in such manner as to create an obstruction, over which Overstreet fell and was injured. There was a trial to a jury, and, at the close of all the testimony, the court sustained defendant's motion for a directed verdict in its favor. From this order and from the judgment rendered on the verdict, the city appeals.—*Reversed.*

H. W. Byers, Reson S. Jones, and D. Cole McMartin,
for appellant.

Parrish & Cohen, for appellee.

WEAVER, C. J.—The grounds of the motion for a directed verdict were, in substance, as follows:

(1) That the evidence discloses no negligence of the water company, contributing in any degree to the injury or death of Overstreet, and does not show that the company was under any obligation to maintain the pipe or "stop box" over which Overstreet fell.

1. HIGHWAYS:
obstructions:
standpipes of
water com-
pany: negli-
gence.

(2) That the evidence shows conclusively that the condition of the walk referred to was due to the negligence of the city alone.

(3) That, if the company owed any duty with respect to the maintenance of the pipe or stop box, the city was also negligent, and the accident was occasioned by the joint tort of the city and the company, and neither can recover from the other.

The fact situation is the subject of but little dispute. The water furnished by the defendant company is distributed through a system of mains, laid along the course of the streets, and from the mains it is supplied to individual users, through branch or service pipes extending from the mains to the adjacent lots and buildings. The method of obtaining these connections for the use of adjacent property is about as follows: The property owner first makes written application to the company therefor, and is told to go to a licensed plumber, who obtains from the water company a permit to tap the main, and from the city a permit to open the street. The plumber then digs down to the main, at a point where the connection can be made, and opens a trench as far as may be necessary for laying the service pipe. In laying this pipe, when the plumber reaches a convenient point between the curbing and the lot line, he puts in a "stop box" and stopcock, by which the flow of water through the pipe is controlled. To provide means for operating this stopcock, a pipe extends therefrom to the surface above, and in the pipe is a rod, connecting with the stopcock. By this rod, with the aid of a

key, the cock is turned to admit or cut off the water. The property owners do not usually have these keys, and the water is ordinarily turned on and off by the company. From this stop box, the service pipe is extended into the building, ordinarily into the cellar, where it is connected with a meter, by which the supply is measured. There is also another stopcock at the meter. When the work is done, the plumber reports to the water company, and furnishes it with a plat showing the location of the stop box. The cost of the work we have described is paid by the property owner, but the meter is furnished and owned by the company. Concerning the practical use made of the facilities we have described, the principal managing officer of the defendant, after testifying to matters already mentioned, says, among other things, that, when a water user gives notice that he is about to move:

"We shut off the water,—turn it off at the stop box. One of our men takes a key for that particular box, if it requires a different key, and goes to the stop box and cuts off the water and leaves it locked. * * * The property owner has no authority whatever, either from the company or the city, to interfere with that water box at all, except to make proper use of it. If you had a house upon Fifth Street that was connected up with our plant, and you were not living there and were not paying for water, and you were not getting any water from us, you would not have any right to go and open that up. You would have to get authority from the company. * * * If a customer on our books does not pay his bill, or if we have a controversy with him about the water, we enforce our orders and demands by shutting off the water at the stop box we are talking about. * * * The water consumer has no right or authority to touch the stop box or to open it up again unless he gets authority from the company. That was the practice and the rule with respect to this house where the

accident occurred. We have one invariable rule: that is, if the water is turned off for nonpayment of rent, the property owner must not turn it on again until he pays.
* * * We have another fixed rule, and that is that we will not furnish water to anyone through a water service connection until the stop box attachment is made."

The evidence tends also to show that the pipe from the stop box to the surface was $1\frac{1}{2}$ inches in diameter, and was covered by an iron cap, screwed to the top. This cap, as we take it, stood substantially level with the sidewalk at the time the connection was completed; but, in the course of years, the walk had so settled as to make the top or cap protrude 2 or 3 inches above the surface. It was over this obstruction that the deceased, Overstreet, is alleged to have fallen, and received fatal injuries. After his death, action was brought against the city by the administratrix of his estate, charging the city with negligence in permitting said pipe to thus obstruct the street and render the use of the street dangerous for pedestrians. To said suit the water company was also made a defendant; but, before any action had been taken therein, the administratrix dismissed her suit as to said company. Thereafter, the city entered into a settlement, and compromised with the administratrix concerning her claim for the agreed sum of \$2,500 damages and \$24.05 costs, which was then and there paid her for the benefit of the estate of the deceased. This settlement, the appellee herein concedes, was reasonable and fair, and made in good faith.

The foregoing statement is sufficient to present the real nature of the claim and defense. Assuming its truth, would the jury have been justified therefrom in finding the defendant company chargeable with negligence on account of the condition of the sidewalk, as affected by the water pipe's protruding from its surface?

I. In approaching and considering the issues in this

case it is important to keep in mind the fact that this controversy is not one between the water company and the owner of the property for the use of which the service pipe and connection were constructed. Were the water company and property owner here disputing as to which, if either, is primarily bound to maintain and care for the stop box and pipe constructed in or under the sidewalk, the inquiry as to who, in fact, asked for it or ordered it or constructed it or paid for it, would be quite material and perhaps decisive; but, for reasons which will be apparent as we proceed, those matters are far from conclusive in this action. The inquiry here is not at all what duty the water company owed or owes to the property owner with whose lot or building the water connection is made, but what duty, if any, the company owed or owes to the city and public whose streets it uses for its own profit in serving the property owner.

For this reason, we are unable to agree with appellee that the fact, appearing in the record, that, by city ordinance, no one was authorized to make any excavation in the streets without application to or permit by the city or its board of public works, and that the application in this instance was made by, and the permit issued to, the property owner, or that he was himself a licensed plumber, and himself performed the work, is, of itself, controlling of the case before us. Nor do we think it quite a correct statement of the case, as developed by the testimony, that the only interest defendant had in the stop box and its attachments was "simply the right to use it in common with any plumber or other person who had occasion to shut off the water." The clear effect of the defendant's own testimony and the explanation which seems to have been given very frankly by its superintendent on the witness stand, to say nothing of common knowledge and common observation of the methods everywhere in use by public service water com-

panies, is that the entire aggregation of its correlated parts, extending from the source of its supply through its network of mains, conduits, and service pipes to the meters through which the water is finally measured and delivered to the consumer, is but a single system, over which the company exercises (and, for present purposes, we may say it necessarily exercises) a control which is little less than autocratic. Although the property owner is required to be at the expense of making the connection between the company's main and the company's meter, yet, when made, and thus incorporated into the system of water distribution, it passes, to all practical intents and purposes, into the paramount control of the company.

The stop box and stopcock are, in effect, the lock or gate by which the company controls the water supply to the property owner. The company opens it only when its rules are complied with; and, when dispute or disagreement arises between it and the lot owner, it locks the gate and cuts off the supply. The control of the stop box and cock is thus made an efficient means of discipline in enforcing the company's rules and demands. In the language of the superintendent:

"If a customer on our books does not pay his bill, or if we have a controversy with him about the water, we enforce our demands by shutting off the water at the stop box.

* * * The consumer has no right or authority to touch the stop box or open it up again unless he pays his bill and gets authority from the company to open it up again."

The suggestion of counsel that the stop box and its attachments are simply a convenience furnished by the lot owner, and only used by the company in common with the plumbers and others, is not borne out by the record.

There is nothing in the evidence tending to show that, during the 24 years and more which have elapsed since this stop box was put in, the lot owner has ever assumed its use

or control in any form or to any extent. But, were it otherwise, and were it to be conceded that the stop box and the pipe extending therefrom to the surface of the sidewalk were kept and maintained for the common use and convenience of the company and the lot owner, it would clearly still be the duty of the company, as well as of the lot owner, to use reasonable care to see that such apparatus, planted in the public walk for its use (whether exclusive or in common), is so constructed and maintained as not to create a nuisance or source of peril to persons lawfully using the public way.

It is unnecessary, therefore, to attempt any very exact definition of the mutual rights and obligations of the company and the customer or property owner whom it serves. The company, by its franchise or its contract with the city, is granted a license to use the streets for the construction of its system. Of necessity, this implies the right, under proper regulation, to lay its mains and pipes beneath the surface, and at many points to extend them under and across the course of public travel; and, as a matter of law, it must be held to be an implied condition of such license that these instrumentalities by which it distributes its water supply to its patrons shall be constructed and maintained with reasonable care for the safety of those who are lawfully exercising the primary right of the public to use the streets for the purposes of travel. These propositions appear to us to be quite elementary, and to call for no extended inquiry into the precedents afforded by the decided cases. But, as bearing upon the principle involved, see *Gas L. & C. Co. v. Columbus*, 50 Ohio St. 65 (19 L. R. A. 510).

Our attention is called, however, to a decision of the Supreme Court of the United States which is much like the case before us both in fact and in the principles applied. See *Washington Gaslight Co. v. District of Colum-*

bia, 161 U. S. 316 (40 L. Ed. 712). In that case, the gas company placed its stop box in the street, to control the flow of gas through a service pipe to the house of an adjacent owner. It was put in by the company at the request of property owners, by whom the cost or expense of the installment of the connection so made was paid. The work, as constructed, was skillfully done and reasonably safe. In the matter of the use and control of the stop box, the evidence was not materially unlike that which appears in the instant case. After the stop box was put in, the street was widened, and, by reason of this change, the box came to be about in the middle of the sidewalk. The cover, which was about level with the surface of the walk, was broken, or had been removed; and the plaintiff, in using the walk, stepped into the opening thus made, and was injured. There, as in this case, the company defended on the ground that there was no duty resting upon it to maintain or repair the stop box; that it was placed in the street at the request of the property owner, and paid for by him; and that the company did not assume, nor was it charged with, any duty for its proper maintenance. Plaintiff sued the city on account of the injury so sustained by her, and recovered a judgment for damages; and the city, having paid the judgment, sued the gas company for reimbursement. On the trial of the latter case, the court instructed the jury, as a matter of law, that the stop box "was a part of the apparatus of the company, and hence it was its duty to exercise proper care over it, and thus to prevent injury to persons using the sidewalk." On appeal by the gas company from a judgment in the city's favor, the court, speaking by Chief Justice White, affirmed the recovery, and said:

"The plain object contemplated by the formation of the gas company was the supplying of the gas, to be by it manufactured, to consumers; and it is obvious that this

could not be done without making a connection between the street mains and the abutting dwellings. When such connections are made with the mains, they receive from them and convey into dwellings highly inflammable material, which flows by an uninterrupted channel from the mains themselves into such dwellings. It must, therefore, have necessarily been contemplated that such connections with the mains as were, from their very nature, incidental to and inseparably connected with the consumption of gas should be a part of the apparatus of the gas company, and be under its control, rather than under that of the city or the property owner."

Further discussing the case, the court says:

"It would be unreasonable to infer that Congress, when it authorized the use of the streets or sidewalks for the purposes of the gas company's business, contemplated that the city of Washington * * * should keep in repair such apparatus, the continued location of which in the sidewalks of the city was permitted, not only as an incident to the right to make and sell gas, but also for the pecuniary benefit of the gas company. We conclude, therefore, that the duty was imposed upon the gas company to supervise and keep the gas box in repair. * * * Nor do we think that this duty was affected by the circumstance that the cost of the labor and materials used in the construction of the connection and gas box was paid by an occupant or owner of property, who desired to be furnished with gas. As the service pipe and stopcock was a part of the apparatus of the company, and was used for the purpose of its business, it is entirely immaterial who paid the cost, or might in law, on the cessation of the use of the service pipe and gas box by the company, be regarded as the owner of the mere materials."

So reasonable and just seems to be the rule applied in the cited case, and so fundamental is the principle that

a party who is licensed to use the street for the purposes of private profit, even though the use be one of public utility, is charged with the duty to exercise all reasonable care that the instrumentalities of such use are not permitted to become nuisances, that argument in their support can hardly be necessary.

In so far, therefore, as the judgment entered by the trial court exempts the defendant from the duty or obligation to so keep and maintain the stop box and pipe in question that they do not constitute a source of danger to persons lawfully using the sidewalk, it cannot be sustained.

II. Assuming the existence of such duty, does the evidence make a case for the jury upon the question of defendant's negligence? On this point there is little room

for controversy. It is probable that, as

2. NEGLIGENCE:
protruding wa-
ter pipe in
sidewalk.

originally constructed, 24 years before the accident to Overstreet, the upper end and

cap of the stop box pipe were substantially

level with the surface of the sidewalk, and did not then con-

stitute any obstruction to the safe use of the walk by pedes-

trians. Later, as we have before said, the walk had settled,

leaving the pipe and cap protruding above the surface in

such manner that a traveler, exercising ordinary care,

might readily trip, and receive a violent fall. Just how

long this condition had existed at the time of the accident

is not definitely shown, but there is testimony from which

it could be found that the defect had been noticeable for

two years; and the court cannot say, as a matter of law,

that this was not a sufficient period for the appellant, in

the exercise of reasonable supervision over its apparatus

in the public street, to have discovered it, and to have re-

moved the danger thereby created.

The question of negligence and notice, as well as of

proximate cause, was also for the jury.

III. Appellee also relies upon the proposition that,

even if it be chargeable with negligence, the city was also negligent, and contends that, under the familiar rule that one joint tort-feasor cannot maintain an action to enforce contribution from another, the trial court rightfully dismissed the plaintiff's action.

3. MUNICIPAL CORPORATIONS: primary and secondary negligence: recovery.

The soundness of the rule is to be admitted, but it does not avail the defendant in this case. In the first place, as between the company and the city, the primary duty to so maintain the pipe as to avoid endangering the walk for public use, was upon the former; and, as between the public and the city, the latter became chargeable with negligence only when it failed to exercise care in requiring the company to remedy or remove the defect. Being so negligent, and an injury having so resulted to Overstreet, the city could not avoid liability to the injured man by shifting responsibility for the fault to the shoulders of the water company; but, having paid the damages for the injury so inflicted, it could rightfully demand of the water company satisfaction for the amount it had thus been compelled to pay. See the case above cited, *Washington Gaslight Co. v. District of Columbia*, 161 U. S. 316 (40 L. Ed. 712); *City of Sioux City v. Weare*, 59 Iowa 95; *City of Ottumwa v. Parks*, 43 Iowa 119; *Inhabitants of Milford v. Holbrook*, 91 Mass. 17.

Whatever doubt there may be, under the somewhat conflicting precedents, as to the extent of the liability of an abutting owner to the city for damages paid by the city on account of his mere omission to perform some duty imposed upon him by law or ordinance, there can be none where the negligence is that of one occupying the street or walk as a mere licensee, under an express or necessarily implied obligation to avoid the creation of a nuisance therein. It has been well said by the New York court that,

upon receiving license to occupy a public street for a private purpose, "the licensee impliedly agrees to perform the act in such a manner as to save the public from danger and the municipality from liability." *Village of Port Jervis v. First Nat. Bank*, 96 N. Y. 550, 557. And when the municipality, having paid damages because of the licensee's negligence, sues the latter for reimbursement, it is not a claim by one joint tort-feasor against another, but is rather a claim for failure of the licensee to perform its undertaking to save the licensor from liability on account of the former's negligence. Or, to quote again from the Massachusetts court:

"The plaintiffs were not *in pari delicto* with the defendant, and therefore the principle that one joint wrongdoer cannot have contribution against another has no pertinency. The only fault or negligence which could be imputed to the town, on the facts shown, was a failure to remedy the nuisance which the defendant had caused. This is no bar to their claim for indemnity." *Inhabitants of Milford v. Holbrook*, *supra*.

It is further objected, if we understand counsel, that the city was negligent in that the projection of the pipe above the walk was not caused by any act of the defendant, but by the settling of the walk, a condition which the city had not attempted to remedy by lifting or building the walk up to its original level. In our opinion, there is nothing in the testimony from which the jury could find the city negligent in this respect. Few, if any, sidewalks, especially if constructed of brick, stone, or cement, and laid upon the earth, will not settle to some degree, in the course of years; and, if such settling be not so great or so irregular or uneven as to materially affect its solidity, safety, or usefulness, it cannot be said to show any breach of duty on part of the city. It may also properly be said

4. MUNICIPAL CORPORATIONS:
sunken walk.

that the defendant, being charged with the duty to properly maintain the stop box, may be presumed to have understood the natural tendency of the walk to settle, and the consequent elevation of the upper end of the standing pipe above the surface. The duty to care for these instrumentalities implies, as well, the duty of inspection at reasonable intervals; and, if this had been done at any time during the two years before Overstreet received his injuries, the need of the repair would have been apparent.

It follows from what we have said that the trial court erred in directing a verdict for the defendant, and a new trial must be ordered.

The judgment of the district court is, therefore,—*Reversed*.

LADD, GAYNOR, and STEVENS, JJ., concur.

E. J. DILLEHAY, Appellant, v. W. H. MINOR, Appellee.

LANDLORD AND TENANT: Common Passageways—Duty of Land-

- 1 lord. A landlord who is pursuing the general practice of renting his premises to *various* tenants must maintain with reasonable care the stairways used *in common* by his tenants, even though, at the time in question, plaintiff, who was injured, was his *only* tenant.

APPEAL AND ERROR: Review—Directed Verdict—Most Favorable

- 2 Construction Rule. Principle recognized that, on an appeal from a directed verdict, the record must be considered from the standpoint of the facts which the jury would be justified in finding.

NEGLIGENCE: Choosing Less Safe of Two Ways. Knowingly

- 3 choosing the less safe of two ways does not *per se* establish either (a) assumption of risk or (b) contributory negligence. So held as to two stairways.

Appeal from Dickinson District Court.—JAMES DeLAND, Judge.

JANUARY 20, 1920.

ACTION at law to recover damages for personal injury. There was a directed verdict and judgment for the defendant, and plaintiff appeals.—*Reversed.*

Francis & Owen and Cosson & Francis, for appellant.

Heald & Cook, for appellee.

WEAVER, C. J.—The defendant is the owner of a two-story building in the town of Milford. The first story is occupied and used by him as a pool hall. The second story is divided into rooms to let. Some of these rooms are reached only by a flight of stairs at the rear of the building. Access to the other rooms, several in number, is provided by a flight of stairs leading up the side of the building from the front, and another leading up the same side from the rear, and landing on a common platform at the level of the second floor. From this platform there is an entrance, which serves all the second floor rooms except those at the rear, already mentioned.

1. LANDLORD AND
TENANT:
common pas-
sageways: duty
of landlord.

In April, 1917, the defendant employed plaintiff to take charge of the pool hall, for which service plaintiff was to receive a stipulated weekly wage, and to have the use of one of the rooms on the second floor, to which access was had by the two stairways and platform to which we have just referred. Plaintiff took possession of the room assigned to him, and, as the two flights of stairs leading to the entrance platform were both open, he used either, as happened to be most convenient, for the purposes of ingress and egress. In May, 1917, when he had been in the defendant's service about six weeks, plaintiff left the pool hall to go to his room by way of the stairs leading up from the sidewalk in front to the landing platform. In so doing, the fourth or fifth step from the bottom gave way, causing him to fall back to the sidewalk and suffer bodily injury of more or less serious character.

Later, this action was brought at law to recover dam-

ages on account of such injury, which, it is alleged, was occasioned by the defendant's negligence in permitting the stairs to become and remain in a rotten, decayed, and unsafe condition.

Answering this claim, defendant admits that the stairway was old, decayed, and unsafe, and that plaintiff fell thereon, but denies that he was injured, and denies that defendant is chargeable with any negligence with respect to said stairway or with respect to the plaintiff's fall or alleged injury.

It is further pleaded that plaintiff knew the condition of the stairway; that the other flight of stairs to the platform was safe, to the knowledge of the plaintiff; that access to his room by the safe way just mentioned was as convenient as by the unsafe way, and plaintiff, having used the latter with full knowledge and appreciation of its dangerous condition, assumed the risk of such use, and for like reasons is also chargeable with contributory negligence.

The issues so joined were tried to a jury. At the close of the evidence, both parties having rested, the defendant moved for a directed verdict in his favor, on the following grounds:

(1) That it conclusively appears that the defect in the stairs was open and visible, and that another and safe way was provided for plaintiff's entrance to his room, and plaintiff, having taken the dangerous way with full knowledge of the conditions, assumed the risk.

(2) That, as a matter of law, plaintiff should be held guilty of contributory negligence.

(3) That, plaintiff being in the sole possession of the rooms served by these stairways, the defendant, as landlord, was under no duty or obligation to make the entrance or stairs safe for plaintiff's use.

This motion was sustained generally, and from that

ruling, and from the judgment entered upon the directed verdict, the plaintiff appeals.

I. In argument to this court, counsel on both sides give principal attention to the third or last proposition above mentioned, relating to the duty, if any, resting upon a landlord to provide or maintain a reasonably safe entrance to leased premises.

It seems to be conceded by appellant that, where the landlord leases the entire premises to a tenant, without any promise or covenant to repair or keep in repair, the tenant takes the premises as he finds them, and assumes the risk of their safety. It is insisted, however, that this rule does not extend to entrances, stairways, platforms, corridors, and the like in which the tenant is granted no more than the right to use in common with the landlord or with other tenants of the landlord, and that, in such case, the latter is chargeable with negligence if he fails to exercise reasonable care to keep the common passages in proper condition, and he is liable to the tenant for injury so occasioned to him.

The appellee does not seriously question the correctness of this position, but denies that plaintiff has made a case for an application of the conceded principle, because, say counsel, the plaintiff, at the time of his injury, was the only tenant in any of the rooms served by this stairway, and he is, therefore, not within the rule which charges the landlord with any responsibility for the condition of a stairway or entrance used in common.

Giving to the plaintiff, as we are required to upon this record, the benefit of the most favorable construction of which the testimony is reasonably susceptible, the jury could have found that plaintiff was not the lessee of all the rooms served by this stairway or entrance; that one or more of the rooms were occupied by other tenants of the defendant, when plaintiff took posses-

2. APPEAL AND
ERROR: review:
directed ver-
dict: most
favorable con-
struction rule.

sion of his room, and, although vacant at the time of the accident, they were, nevertheless, under the control of the defendant himself, with full power and authority to let them to other tenants, without the consent of the plaintiff. As a witness in his own behalf, the defendant describes the premises let to the plaintiff as follows:

"I told him I had those rooms upstairs there, and I wasn't going to rent, and would have no use for until I rebuilt those steps and fixed the rooms up; and I told him he could have one of them if he wanted it."

Plaintiff denies that defendant said anything to him about the front stairs' being unsafe, but says:

"The room he let me have is the second room from the west end on the second floor."

There is, also, as already stated, evidence from which it could be found that some of the other rooms were occupied by other tenants when plaintiff moved in, though these tenants had vacated the premises before the accident. If these things be true, and their truth was for the jury to pass upon, the plaintiff was never leased or given exclusive possession of more than one of the rooms having their entrance and exit over the common platform. The fact that the other rooms had become vacant does not, in our judgment, operate to discharge the defendant from his obligation to look after the safety of the stairs upon which he himself and all of his tenants in that part of the building depended in common with plaintiff, for the beneficial use of the premises. The reciprocal duties and obligations of the landlord and tenant with reference to ways or passages enjoyed in common are to be tested by their contract, and do not fluctuate or disappear and reappear, according as the other rooms or apartments to which the common passages are appurtenant may or may not be filled with tenants.

The general subject of the liability of the landlord for

the condition of entrances and hallways in buildings leased by him has been considered by this court on several occasions. *Burner v. Higman*, 127 Iowa 588; *Morse v. Houghton*, 158 Iowa 279, 282. See, also, *Watkins v. Goodall*, 138 Mass. 333; *Loney v. McLean*, 129 Mass. 33; *Starr v. Sperry*, 184 Iowa 540; *Peil v. Reinhart*, 127 N. Y. 381; *Siggins v. McGill*, 72 N. J. L. 263; 18 Am. & Eng. Encyc. of Law (2d Ed.) 220; 24 Cyc. 1116; all holding to the rule as contended for by the appellant.

The law as laid down by these authorities has the general approval of the courts. With the rule thus settled, the question left in the case is one of fact, on which there appears to be a conflict of evidence, the determination of which is for the jury.

There was no such state of facts developed on the trial as would justify the court in holding the plaintiff chargeable with assumption of risk, as a matter of law. The de-

fendant testifies that he notified plaintiff of

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the unsafe condition of the stairs, and that plaintiff knew their condition to be such that he could not safely use them; but this

the plaintiff denies. If a jury should accept plaintiff's story in this respect, there was no assumption of risk. The same may be said upon the question of contributory negligence. Even if plaintiff did know that the stairs were old and dilapidated, or that the other stairway afforded a safer passage, it does not follow conclusively that he was negligent in using the front stairs; for if, as a reasonably prudent person, he had the right to believe, and did believe, that he could make the ascent in safety by exercising proper care, then a finding by the jury that he was not negligent should be upheld. *Kendall v. City of Albia*, 73 Iowa 241; *Nichols v. Incorporated Town of Laurens*, 96 Iowa 388; *Norris v. Cudahy Packing Co.*, 124 Iowa 748, 751.

It follows, we think, that the peremptory direction of

a verdict for defendant is not sustainable upon any of the grounds assigned for it, and the judgment appealed from must be reversed, and cause remanded for a new trial.—*Reversed.*

LADD, GAYNOR, and STEVENS, JJ., concur.

J. S. EASON, Administrator, Appellant, v. DES MOINES
ELECTRIC COMPANY, Appellee.

NEGLIGENCE: Contributory Negligence—Insulated Electric Wires.

- 1 A jury question is presented on the issue of contributory negligence when the jury might find that the deceased unnecessarily took hold of an insulated electric wire, with knowledge, and after being warned, of its dangerous condition.

TRIAL: Instructions—Pleadings Control. Error may not be predi-

- 2 cated on lack of clearness in instructions, when they are fully as broad as the pleadings, and are in harmony with the statements of counsel to the court. So held where the pleading and counsel's statements to the court rested the question of negligence on the *original* setting of a pole, and not on its subsequent *maintenance*.

Appeal from Polk District Court.—LAWRENCE DE GRAFF,
Judge.

JANUARY 20, 1920.

ACTION by the administrator to recover damages on behalf of the estate of deceased for his death, caused, as is alleged, from the negligence of the defendant. There was a trial to a jury, and a verdict and judgment for the defendant. The plaintiff appeals.—*Affirmed.*

Miller, Parker, Riley & Stewart, Webb & Webb, and H. L. Bump, for appellant.

Charles S. Bradshaw, for appellee.

PRESTON, J.—Omitting formal parts, the petition alleges, substantially, that, on October 17, 1917, deceased, an employee of one Nugent, a commission dealer in horses,

was working in and about the stockyards of one Talbott, in the city of Des Moines, which stockyards were the place of business of Nugent. Defendant was dispensing electric current to the various industries about

1. NEGLIGENCE :
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tric wires.

the stockyards, and maintained a line of wires to a point about 25 feet from the northeast corner of the rendering works operated by Percival, at which point there was located a wooden pole, 40 feet in height, to support the wires. Said pole was located about 150 or 200 feet southwest of the stockyards. Said wires ran northeasterly from said pole, 200 or 300 feet, to another pole of similar height, located in the middle of the Talbott stockyards. A large number of Nugent's horses were in the stock pens of Talbott. In the early morning of the date stated, the pole near the Percival works fell to the ground, causing the wires to fall into and across the stock pen where the horses were located. Deceased was directed by his employer to assist in removing the horses from the stock pen across which the wires had fallen, the fallen wires being in a portion of a stock pen, suspended a short distance above the ground, and resting upon a portion of the fence surrounding the stock pen, and upon a feed trough therein. The horses were to be removed, to prevent injury to them. The petition further alleges that, in attempting to reach the horses, and drive them away from the wires and out of the pen, deceased laid hold of the wires at or near the place where they were suspended across the feed trough; that deceased was instantly killed by the electric current; that deceased had no knowledge or notice that the wires carried an electric current at the time he came in contact with them; that, at the time of the death of deceased, the pole

located at the northeast corner of the Percival works had not been and was not set in the ground by the defendant herein, but had been merely placed in a pile of ashes, which ashes had worked away, and permitted said pole to fall; that the said pole was not properly supported, and had no support to hold the same in position; that deceased was not guilty of contributory negligence; that defendant was negligent in this: (1) In failing to place and set said pole, at the corner of the Percival rendering works, deeply and firmly in the ground, for the support of the same. (2) In failing to properly mark said pole with any danger sign whatever, and in failing to notify this defendant [plaintiff], or this defendant's [plaintiff's] employer, of the danger contained in said wires. Other grounds of negligence were set out, but they were not submitted, and we do not understand appellant to complain of such failure.

The answer admits that one of defendant's poles, in the neighborhood of the stockyards described in the petition, fell, on or about the date alleged, and that deceased, in attempting to remove one of the wires which had been attached to said pole, picked up the wire, and was instantly killed; denies generally allegations not admitted; denies that it was negligent; alleges contributory negligence on the part of deceased. Appellant states in argument that this appeal is based upon the proposition that the verdict of the jury, which was not in favor of the defendant, is contrary to the evidence, is wholly unsupported by the evidence, and is the result of passion and prejudice, and is contrary to law. At the time the city ordinances were offered, which, we understand from the additional abstract, was at the close of the defendant's evidence, counsel for appellant stated to the court:

"There are two things in this case that I think are for the consideration of the jury, and one is the negligence of the defendant in reference to the setting of that pole.

"Court: You need not argue that; I will submit that.

"Mr. Miller (continuing): And the other is as to the conduct of the plaintiff. Those are the questions I want to argue to the jury, and I want to argue to the jury, as bearing upon the question of the conduct of the plaintiff, the fact that this appeared to be, and, so far as the evidence shows, was, an insulated wire.

"Court: I shall tell the jury to consider that question."

In stating the facts, we shall attempt to state only such as bear on these two propositions, with, perhaps, some additional facts which may appear to have a bearing on some other questions presented here.

It was shown by the evidence, or, upon a conflict therein, the jury could have found, that the pole which fell had been set in place about three years before, in a pile of cinders 15 feet long one way and 18 feet the other, and 5 or 6 feet deep. It did not go through the cinders, so as to be set in the soil. It was seated beside the stump of another pole. The person who set it testifies that it was securely set at that time. About a year or more before this accident, the cinders from the outer side of the pile had been removed by persons other than the defendant, leaving a mound of cinders a few feet across and surrounding the pole. The defendant had been notified of the condition of the pole prior to the accident. The pole carried three good-sized insulated wires, with a voltage of 2,300. The wires were as large as the little finger, or larger. About 9 o'clock in the morning, or a little before, on the day in question, the pole was blown down by a high wind, carrying with it the three wires, which fell to the ground outside of the stockyards, the wire resting on the top wire of two barbed wires, which were strung along the top of the west tight board fence of the stockyards. The board part of this west fence was 8 or 10 feet high, above which were the two barbed wires, making the fence 10 or 11 feet high. In con-

tact with the barbed wires, one or more of the electric wires, either immediately, or soon afterwards, burned off one or more of the barbed wires, making a noise described as like that of the crackling of burning weeds. From the top of the west fence, the electric wires sagged, as they ran to the northeast, in the stock pen, the low point being over a feed trough, which ran north and south in the stock pen, about 18 feet from the fence, and parallel therewith, the wires touching the feed trough, and then ran at a sharp angle upward to the top of the next pole, which was in the stock pen farther east than the feed trough, and 35 or 40 feet high. The wires dropping down from the pole and passing to the west fence crossed the feed trough some feet south of the north end of it. From the north end of the feed trough to the north fence of the stock pen, it was about 55 or 60 feet, making the space north of the wires, where down, about 18 feet, east and west, by 60 or more feet north and south, and open to the west fence. The wires were not down within reach on the east side of the feed trough, and, after sagging to the feed trough, they ran up again to the high fence, 18 feet away. The stock pen was 83 feet north and south, and 110 feet east and west. The feed trough was about 23 feet long, $2\frac{1}{2}$ feet wide, and $3\frac{1}{2}$ feet high. A part of a large plat is here set out, showing the stock pen. The pole that fell was located southwest, and the rendering works still farther west or southwest.

appellee contends, the substance of the message received from Talbott. There is evidence showing that this message was repeated in the presence of deceased, but there is a conflict in the evidence as to this. Chesney, who was Nugent's son-in-law, and the manager, directed deceased, Foley, and Ray to proceed with him to the stockyards to get the horses out. They proceeded west from the inspection place, thence north through the alley, and through the gate at the southeast corner of the feed pen, which contained the horses; they proceeded west along the south fence in the feed pen to a point near the west fence and south of the feed trough. Meanwhile, Talbott had entered the feed pen, and was keeping the horses away from and north of the fallen wires, and up along the north side of the pen. The horses were quiet, and apparently had not sensed any danger. They were along the north fence, and, according to some of the witnesses, east of the wire and of Talbott—though there is some dispute about this; some of the witnesses claim that they were farther west. Chesney walked up the east side of the feed trough, and under the wires as they ran up to the pole, and joined Talbott in herding the horses. Deceased, followed by Foley, a few feet behind, approached the down wires, going west around the south end of the feed box, and, instead of passing under the wires, as appellee contends he could have done, east of the feed trough or along the west fence, he took hold of one of the wires, apparently for the purpose of raising it and pushing it up and over the west fence. He was not able to let loose of the wire, and fell to the ground, pulling the wire further down with him, and so remained until, some minutes later, an employee of defendant's arrived, and removed the wire from the grasp of deceased. Deceased died as a result of the contact. This was between 9 and 10 o'clock in the morning.

There is evidence, and the jury could have found, that none of the horses were, at any time, near enough to the

wire to be in danger of receiving a shock, or becoming entangled in the wires; that none of them were nearer than 50 or 60 feet north. There is testimony that Talbott and others "hollered" to deceased to look out, and not touch the wire, when deceased was walking towards it. Talbott says that deceased did not make any reply, and he does not know whether he heard him; that deceased kept right on moving; did not run toward the wire, but seemed to quicken his pace; that he addressed his remark to deceased. Plaintiff's witnesses testify that no warning was given deceased before he took hold of the wire, thus making a conflict at this point. Perhaps we ought to go a little more into detail as to one or two of the conditions. Ray, a witness for plaintiff, testifies that deceased, Chesney, and Foley were at the inspection place, and sitting there when he, Ray, delivered Talbott's message to Nugent. The lights went out before Talbott sent word down there. Witness knew that Talbott was talking about electric light wires; knew there was something wrong with the current. The lights went out where deceased was. The first thought of witness was that the horses should be kept away from contact with the electric wires. He went there to get the horses out; presumed the wires might be dangerous; didn't know to what extent; didn't know whether the horses would get shocked or tangled up. There were no horses in the southwest corner. Chesney, testifying for plaintiff, says he noticed that, where the wire had crossed the fence, it was burning at different places along the wire; could see sparks fly, after deceased fell to the ground; observed that, just as soon as he turned around and saw deceased in trouble; observed that at that time. It is not claimed that anyone told plaintiff that the wires were carrying a dangerous current of electricity. Talbott says he did not tell him or anyone else, and says they had the same chance to know and the same right that he did, just from general knowledge of

electric wires. There was no sign or warning posted in the stockyards on the wire or pole. Counsel for each party points out circumstances bearing on the interest of the different witnesses and the contradictions, but we do not deem it necessary to go into the evidence further. The credibility of the witnesses was, of course, for the jury. Whether deceased was warned, whether he heard the warning, if given, or was in a position to hear, and whether he was present and in a position to hear Ray deliver the Talbott message, and like matters, were questions for the determination of the jury. Appellant's brief points will be taken up in the order in which they are presented.

1. It is thought by appellant that, if the verdict of the jury is bottomed on the idea of contributory negligence, it is without foundation, and is contrary to law and the evidence; that deceased was neither negligent in law nor in fact, and that we should so say. Cases are cited holding that, where persons have been injured or killed by laying hold of insulated wires, such persons may not be held guilty of negligence, as a matter of law, and nonsuits granted on that ground have been set aside. We think that does not quite meet the situation. In this case, the court did not hold, as a matter of law, that deceased was guilty of contributory negligence, but submitted the question to the jury; and we think the evidence was sufficient to sustain a verdict for the defendant on that ground, if that was the finding of the jury. It seems to us this was probably the vital point in the case. It seems to have been defendant's principal reliance. We have no means of knowing the ground upon which the jury returned a verdict for the defendant. We shall not restate the evidence. The jury could have found that deceased heard the Talbott message in regard to getting the horses out, because it was dangerous, and that deceased was warned not to take hold of the wire. Taking these matters, and all the other circumstanc-

es and conditions, we have no doubt of there being a jury question as to this issue. There is some complaint in argument about the refusal of the court to give Instructions 5 and 6, offered by plaintiff, on the question of contributory negligence. The offered instructions are quite lengthy, and enumerate many of the circumstances in regard to the situation and the conditions; but we think Instruction No. 8, given by the court, fully covered the question. We see nothing in the record that would tend to excite passion or prejudice against the plaintiff and in favor of the defendant.

2. Appellant further contends that, if the verdict is based on the finding of freedom from negligence on the part of defendant, it is contrary to law and contrary to the evidence. It may be conceded that it was a jury question whether defendant was negligent, and a finding to that effect by the jury would have ample support in the testimony.

3. Appellant's next contention is that the fundamental error, the error to which should be attributed the action of the jury in finding for defendant, is that the court, in the instructions in dealing with the question of defendant's negligence, dealt only with the original setting of the pole, which fell, and omitted the alleged negligence of defendant with respect to the subsequent maintenance of it. It is contended that the instructions given told the jury, in substance and effect, that, if the pole was originally properly and securely set, the defendant should be found to have done its duty, regardless of the fact that, after said pole was originally set, the same was not properly and securely maintained; that, under the issues, it was not the original placing or setting of the pole, but the subsequent failure to maintain the same securely, that was the negligence alleged as being the cause of the danger to deceased. In-

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structions 3, 7, and 10 are the ones complained of. It will be observed that the petition heretofore set out first alleges that the pole had not been, and was not, set in the ground by defendant, but had been merely placed in a pile of ashes, which ashes had worked away, and permitted the pole to fall. But the specific charge of negligence, made later in the petition, is in failing to place and set said pole firmly in the ground for the support of the same. It must be conceded, we think, that the last clause is not as broad, as applied to the question now presented in regard to the maintenance, as the first allegation. This, and the further fact that counsel for plaintiff stated to the court, during the trial, or at the close of defendant's testimony, that one of the things for the consideration of the jury "is the negligence of the defendant in reference to the setting of that pole," may have misled the court. The statement of counsel just mentioned is, to say the least, not very definite or specific as to the maintenance of the pole. Appellee contends that the instructions given by the court do cover the point now under consideration, and that the instructions given were more favorable to plaintiff than he was entitled to, under the pleadings and the record. In stating the issues, the court said that the plaintiff alleges:

"That, at the time of the death of the deceased herein, the said pole, supporting said wires in question, which fell, as aforesaid, had not been and was not set in the ground by the defendant herein, but had been merely placed in a pile of ashes and cinders, which worked away and permitted said pole to fall. That said pole was not properly supported in said position. * * *"

Appellant says that this is in harmony with the petition, and we think it is, as to the first allegation before pointed out; but the complaint now is that Instructions 3, 7, and 10 are inconsistent with the one wherein the court stated the issue, and inconsistent with and contrary to an

offered instruction by plaintiff, and contrary to plaintiff's theory of the case. A part of the offered instruction follows:

"Should you find from the evidence that the said pole, located in said pile or mound of cinders, as described by the testimony, was not securely set in such a manner as to reasonably prevent its fall, then the defendant was negligent in respect to the maintenance of said pole in such insecure footing; if you find it was insecure, and, in the event of your so finding, the defendant would be responsible for damages resulting to the said Hugh Cullen or his estate as the direct and sole consequence of such negligent maintenance of said pole in said position, if you find it was negligently maintained in that position."

As said, appellant contends that the instructions of the court relate exclusively to the original setting of the pole; but the court did not so state to the jury, and we think the instructions are not susceptible of that construction. The offered instruction is somewhat broader than the allegations of the petition. The petition did not use the word "maintain." The complaint seems to be more particularly with reference to the failure of the court to use the word "maintain" or "maintenance," and it is true the court did not use that word; but we think the language used in the instruction is equivalent thereto, and at least as broad as the petition. Taking the instructions altogether, we think they are in harmony with the allegations of the petition, and that the jury could not have been misled into thinking that the court referred only to the original setting. It seems to us that the jury must have understood that the court referred to the condition of the pole at the time it fell, and that such condition related to the cause of its falling. The evidence was directed more especially to the setting of the pole: that it was set in a pile of cinders; was not securely set in the ground; that some of the

cinders had been removed, etc. In Instruction No. 1, in stating the propositions to be proved, the court said, among other things, that one of them was "that the defendant was negligent in one or more respects, substantially as charged by the plaintiff, and set out herein." The court, in stating the issues, copied the language of the petition. In No. 2, it was stated that plaintiff must establish "that the defendant company was guilty of the particular act or acts of negligence charged in the petition and set out herein," and that the jury should consider such acts of negligence alleged on the proximate cause of the accident and injury complained of. In Instruction No. 3, the court stated that it was for the jury to determine "whether the defendant was negligent in any of the particulars, as charged by plaintiff and set out herein." Instruction No. 4 reads, in part, that, if the jury should find, by a preponderance of the evidence, "that the defendant company, by its officers and employees, has omitted to do something that a reasonably prudent person would do, or has done something that such a person would not do," it would be warranted in finding the defendant guilty of negligence, etc. Instruction No. 5 reads, in part, that the defendant could be held liable for the damages which resulted from injury "caused by some act of negligence of the defendant, charged by the plaintiff, as herein set out, and proven by a preponderance of the evidence on this trial." A part of Instruction No. 7 reads:

"The defendant company, in placing and locating its poles carrying electric wires must exercise ordinary care, as herein defined, to see that such poles be properly and securely set in the earth;" and that the jury should take into consideration, as shown by the evidence, the character of the ground or soil in which it was set, how and when it was set, and "what notice, if any, the defendant company had of any defect in the setting of said pole at the time of its placement, or thereafter." A part of appellant's offered

instruction, before set out, reads that, if the jury should find that the pole, located in the cinders, as described in the testimony, "was not securely set, in such a manner as to reasonably prevent its fall, then the defendant was negligent in respect to the maintenance of said pole in such insecure footing," etc. There is nothing in this, nor, indeed, in any of appellant's offered instructions in regard to the removal of the cinders. The thought expressed was that, if the pole was not securely set, etc., then defendant was negligent in respect to the maintenance. As said, we think the language of the instructions is as broad as, if, indeed, it is not broader than, the allegations in the petition, counsel's statement to the court, and the offered instructions, except as to the use of the word "maintenance." We think the jury would not consider the matter in any other way than that of the condition of the pole as regards its setting and security at the time it was set, and thereafter down to the date of the accident. The evidence showed that defendant had notice of the removal of the cinders, and the reference to such notice by the court could not have referred to anything else. It may be that the instructions are not as clear as they might have been on the subject; but, as said, they are in harmony with the allegations of the petition, and the statement by counsel to the court.

Some members of the court are inclined to think that the conditions in regard to the pole are out of the case, and that it is doubtful whether that is the proximate cause of the injury. Others think that the condition of the pole was so related to the transaction as that plaintiff was entitled to have the case submitted to the jury on his theory. We have so treated it in the opinion, and our conclusion is that the case was submitted on plaintiff's theory.

We find no prejudicial error, and the judgment is, therefore,—*Affirmed*.

WEAVER, C. J., LADD, EVANS, and SALINGER, JJ., concur.

E. C. FISH, Appellee, v. E. C. WHITE et al., Appellants.

CORPORATIONS: Sale of Unauthorized Stock—Personal Liability.

- 1 The sale of corporate shares of stock which, without the knowledge of the purchaser, have been issued for unappraised property other than money, is a fraud, and the corporate officers participating in such sale are personally liable for the return of the consideration paid, even though they derived no personal advantage from the sale. (Sec. 1641-b, Code Supp., 1913.)

ACTIONS: Joinder—Joint Wrongdoers. Parties liable for the same
2 wrong and in the same sum are properly joined in one action.

TRIAL: Disputed Fact Issue—Directed Verdict. Verdict must not
3 be directed when the evidence on a material issue is fairly in dispute.

Appeal from Polk District Court.—HUBERT UTTERBACK,
Judge.

JANUARY 20, 1920.

ACTION at law to recover damages alleged to have been occasioned by the fraud and deceit of the defendants in the sale to plaintiff of certain shares of corporate stock. There was a directed verdict for the plaintiff, and the defendants appeal.—*Modified and affirmed.*

W. L. Ryan, for appellants.

J. G. Myerly, for appellee.

PER CURIAM.—This is the second appeal in this case. The first appeal was from the action of the court in directing a verdict for the defendants. On that appeal, the case was reversed and remanded. See *Fish v. White*, 180 Iowa 1176. The case is now before us on appeal from the action of the court in directing a verdict for the plaintiff. The opinion filed in the former appeal states substantially the issues submitted on this trial, in

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sale of un-
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stock: personal
liability.

so far as the question here under consideration is involved, and the evidence is substantially the same. For the issues and facts, see our former opinion.

At the conclusion of all the evidence, the plaintiff asked the court to instruct the jury to return a verdict for the plaintiff for the sum of \$1,200, being the amount which the undisputed evidence shows the plaintiff paid for 12 shares of stock purchased by him from defendants, together with 6 per cent interest per annum, for that the undisputed evidence shows the plaintiff entitled to recover at least that amount from the defendant. This motion was sustained, and the jury directed to return a verdict for the plaintiff for the \$1,200 and interest, and for \$330, balance due on wages, together with interest thereon, the court saying:

"I want the record to show that, eliminating the question of fraud and false representations, I am deciding this motion of the issue as to whether or not the stock was issued without authority. * * * I want it understood that this case is not decided on the question of false and fraudulent representations, but on the theory that the stock had been authorized by law: that is, that the statute with reference to appraisalment was not complied with."

The jury returned a verdict for the plaintiff for \$1,778.31, and judgment was entered upon that verdict.

It is not disputed in this case that the plaintiff paid \$1,200 for stock in the corporation of which the defendants were officers; that he purchased this stock from the defendants; that the defendants were president and secretary of the company. It appears without dispute that, prior to the organization of the corporation, a partnership existed between one Cline and these defendants; that, subsequently, the corporation was organized, and the property of the partnership turned in to the corporation, and stock issued to the original partners on the strength of the property so turned in to the corporation. This property was never ap-

praised, as required by Section 1641-b, Code Supplement. 1913. It appears that the plaintiff did not know of this fact when this stock was sold to him.

That the officers of a corporation are personally liable for a fraudulent issue of stock, or stock issued in violation of law, has been settled by this court. *Sykes v. Pure Food Cider Co.*, 157 Iowa 601. When the defendants incorporated and took over the personal property belonging to the partnership, and issued stock, without having the property appraised by the executive council, the stock issued was issued in violation of the statute hereinbefore set out. In issuing the stock, there was an implied representation that the statute had been complied with. The implied representation was that the stock had been fully paid for in cash. In the *Sykes* case, *supra*, it was held that the issuance of certificates of stock was a representation that the corporation had received par value therefor, as exacted by the statute, and the officers issuing the stock are responsible to the persons dealing directly with it, and to all who deal with the stock in reliance upon the representations so made. And it was further held in that case that it is immaterial whether the officers issuing the stock profit by the issuance personally or not; that a showing that they received personal benefit from the issuance of the stock is not necessary to render them liable.

The right of the plaintiff to recover damages for the fraud so practiced upon him in issuing the stock to him is settled by what is said in *Fish v. White*, *supra*; and certainly the fair measure of his damages is the amount he actually paid for the stock, with 6 per cent interest from the date of payment. Assuming that these officers were simply the agents of the corporation in doing what they did in inducing plaintiff to do this, assuming that, after they received the money, they paid it to the corporation, they still remained liable to the party from whom the mon-

ey was received. The money was obtained through their fraud, and to them the plaintiff may look for redress. *Wright v. Eaton*, 7 Wis. 595; *Bocchino v. Cook*, 67 N. J. L. 467 (51 Atl. 487); *Moore v. Shields*, 121 Ind. 267 (23 N. E. 89); *Shipherd v. Underwood*, 55 Ill. 475.

The defendants were both liable for the same wrong and in the same sum. The court did not err in overruling defendants' motion to dismiss as to one of the defendants, and in refusing to require plaintiff to file separate suits.

2. ACTIONS :
joinder : joint
wrongdoers.

However, the court allowed the plaintiff to recover for the balance of wages due him from the corporation. There was a question as to whether he was induced to enter into the employment of the corporation by any fraud practiced upon him by these defendants. There is a question, and there is dispute in the record, as to whether or not these defendants guaranteed or assumed in any way the payment of these wages personally. We think the court erred in directing a verdict as to wages; but, as plaintiff has consented to a reduction of the amount allowed for wages, the judgment is, therefore, ordered reduced by that amount. In other respects, we think the action of the court is supported by the record.

3. TRIAL : dis-
puted fact
issue : di-
rected verdict.

So far as it involves the \$1,200 and interest, it will be allowed to stand; but, as to the wage question, the judgment entered is reduced by that amount.—*Modified and affirmed.*

JOSEPH HERRON, Guardian, Appellee, v. JENNIE S. BRINTON, Appellant.

EVIDENCE: Parol as Affecting Writing—Conditional Delivery.

1 Parol evidence is admissible between the original parties to an

unconditional negotiable promissory note, to show that the delivery was on the agreement that the payment of the annual interest during the lifetime of the payee should work a full discharge of the note. (Sec. 3060-a16, Code Supp., 1913.)

CONTRACTS: Parol to Show Conditional Delivery and Want of Consideration. Principle recognized that, as between the parties, parol evidence may be admissible to show (a) want of consideration and (b) *conditional* delivery.

CONTRACTS: Mutuality—Interdependent Promises. An agreement that one party will furnish the funds for a home, in return for annual interest on the funds advanced during the lifetime of the person so advancing, is enforceable after both parties have acted thereon.

WILLS: Admissible to Prove Contract. A will devising a promissory note to the maker is admissible as an item of evidence on the issue whether the note was given on the condition that the payment of the annual interest during the lifetime of the payee should work a full discharge of the note.

PLEADING: Matters of Inducement. Matters explanatory of the circumstances under which a contract was made are proper: e. g., the family relationship existing between the parties.

Appeal from Hamilton District Court.—G. D. THOMPSON, Judge.

JANUARY 20, 1920.

THE opinion states the case.—*Reversed.*

O. J. Henderson, for appellant.

Wesley Martin, for appellee.

WEAVER, C. J.—The petition alleges that plaintiff is the duly appointed guardian of William Scott, a person of unsound mind, residing in the state of Pennsylvania, and having property subject to said guardian's care in this state; that, on July 1, 1907, the defendant, Jennie S. Brinton, together with her husband, M. H. Brinton, made and delivered to the said William Scott their promissory note for the principal sum of \$1,639.58, payable

1. EVIDENCE:
parol as affecting writing:
conditional delivery.

4 years after date, with interest at 5 per cent per annum, payable annually; and that said note is now past due and wholly unpaid, except a single year's interest, endorsed thereon. Judgment is therefore demanded for the amount of the note, principal and interest. Jennie S. Brinton is made sole defendant, her husband, the comaker of the note, being now deceased.

The answer admits the making of the note, but denies that, at the time of said transaction, the payee was under guardianship, or was of unsound mind. As an affirmative defense, defendant further alleges that said Scott is her uncle, and that, at the time the note was made, and for many years prior thereto, relations of intimate affection and regard existed between him and herself and husband; that, on said date, Scott was visiting defendant and her husband in their home in the town of Ellsworth, Iowa, and then and there urged and advised defendant and husband to build a new home at that place. As an inducement so to do, Scott offered or proposed to advance to defendant and husband the money represented by said note, which, by the mutual agreement of the parties, was made and intended to evidence the obligation of the defendant and husband to pay their said uncle interest on said sum so advanced at 5 per cent annually so long as said payee should live, such payment of interest for his life to be in full discharge of the obligation imposed upon defendants by the acceptance of said money. Said offer on part of Scott is alleged to have been accepted by defendant and husband, and it was upon such consideration and understanding that the note was given; and the said Scott, in pursuance of such agreement and understanding, and to give effect thereto on his part, made and executed his last will and testament, by the terms of which he specifically bequeathed the note now in suit to the defendant.

Defendant further says that, relying on such agree-

ment, she and her husband did proceed to erect a dwelling house at Ellsworth, Iowa, using for that purpose the money so furnished them by Scott, and that, each year thereafter, the interest was paid on the note according to its terms up to the date of the death of her husband, since which time defendant has repeatedly tendered and offered payment of the accruing interest, and is still ready and willing to pay the same.

Plaintiff first attacked the answer by motion to strike all the affirmative allegations therein, as being redundant and immaterial. The motion, being overruled, was followed by a demurrer, on the following grounds: (1) That the matters alleged are contrary to and are an attempt to vary by parol the written contract evidenced by the note; and (2) that the alleged agreement for the making of a will by Scott, giving the note to the defendant, is without consideration, and therefore voidable; and the will, being without consideration, is revocable at the pleasure of the testator, and in no case is available to the defendant during the testator's lifetime.

The demurrer was sustained, and, defendant electing to stand upon her answer without further pleading or amendment, judgment was entered against her for the amount appearing due on the note and costs. From this judgment, defendant appeals.

I. Is the answer obnoxious to the rule which excludes parol testimony to vary or contradict the terms of a written contract?

In its abstract or general statement, the rule is too familiar and too well settled to admit of argument, but its limitations and its applicability to varying states of fact are not always clearly defined. It is subject, also, to numerous exceptions. It is, as a general rule, unquestionably applicable to promissory notes, as to other written contracts. It has, however, always been

2. CONTRACTS :
parol to show
conditional de-
livery and want
of considera-
tion.

held competent, as between the original parties at least, to plead and to prove want or failure of consideration by parol evidence. And, as between such parties, it may be shown that a note in the possession of the payee was delivered conditionally, and was not to become a binding promise to pay, except upon the happening of some stated event, or that the delivery was made for a special purpose only, and not for the purpose of transferring property in the instrument. Code Supplement, 1913, Section 3060-a16; *Selma Sav. Bank v. Harlan*, 167 Iowa 673; *Bookstaver v. Jayne*, 60 N. Y. 146; *Higgins v. Ridgway*, 153 N. Y. 130; *Benton v. Martin*, 52 N. Y. 570.

In the last-cited case, it is held that a note may be delivered to the payee with a valid oral agreement as to conditions upon which it is to become payable, the observance of which conditions is essential to their validity; that the annexing of such conditions to the delivery is not an oral contradiction of the written obligation; and that, as it needs a delivery to make an obligation operative, the effect of it and the extent to which it becomes operative may be limited by the condition attending its delivery. See, also, *Ware v. Allen*, 128 U. S. 590; *Juilliard v. Chaffee*, 92 N. Y. 530; *Jilson v. Gilbert*, 26 Wis. 637; *Dicken v. Morgan*, 54 Iowa 684; *McFarland v. Sikes*, 54 Conn. 250; *Bragg v. Stanford*, 82 Ind. 234; *Kirkpatrick v. Taylor*, 43 Ill. 207; *Slade v. Halsted*, 7 Cow. (N. Y.) 322.

But, for the rule governing the case before us, we need not go beyond the range of our own applicable precedents. In *Oakland C. Assn. v. Lakins*, 126 Iowa 121, we had an action to recover upon a promissory note. There, as in this case, a demurrer to the answer was sustained by the trial court. The plea demurred to was, in substance, that the payee, one Boyd, conveyed to defendant certain town lots, and, in consideration thereof, defendant undertook to pay Boyd interest at 6 per cent on the sum of \$700, during

life; that, to evidence such agreement, defendant, at Boyd's request, made and delivered to him a promissory note for \$700, which paper said Boyd received and held during the remainder of his life, not as a promissory note for said amount, but as security for defendant's obligation to pay the stipulated interest. He further alleged payment of the interest in full, and that, upon Boyd's death, he became and was entitled to a surrender of the instrument. The demurrer was grounded upon the parol evidence rule, and the appeal from the ruling of the trial court sustaining it makes a case which is entirely parallel with the one now before us. In each case, the answer pleads that the real agreement between the parties was for the payment of interest on the sum stated during the life of the payee, and that the note given was made and delivered, not as a promissory note, evidencing a debt for the amount named, but as evidencing and securing to the payee the interest on the principal sum named, during his lifetime.

In each case, also, the question of law is raised whether the facts so pleaded state a defense to an action on the note. We there held, in effect, that the plea not only goes to the question of the consideration of the note sued upon, but was also within the rule permitting proof of conditional delivery, as well as the rule which permits parol evidence of the discharge of a written agreement "although the transaction involves proof of a collateral parol agreement." The ruling of the trial court sustaining the demurrer was, therefore, reversed.

Quite in point, too, is *Marsh v. Chown*, 104 Iowa 556, where, in an action upon promissory notes given by a daughter to her father, it was held competent to plead and prove that they were executed and delivered, not as evidencing a debt, but as being in the nature of receipts for gifts by way of advancements previously made from parent to child.

In the more recent case of *Ball v. James*, 176 Iowa 647, a very similar case was again before this court. There, the executor of the will of one Fickey brought suit against Mrs. James, niece of the deceased, to recover the amount of a promissory note made to the deceased by Mrs. James. Answering the claim thus made, the defendant alleged that deceased in her lifetime, having the sum of \$3,500 on hand which she wished to invest to advantage, requested defendant to take the money and pay her 6 per cent interest thereon during the remainder of her life, and, in consideration of such undertaking, defendant need never repay the principal sum, and deceased would make her will, leaving said sum to defendant; that defendant agreed to the proposition, and received the money, and, to secure the performance of her agreement, she made and delivered to deceased her notes for said sum, with interest at 6 per cent, the deceased promising and undertaking that the principal sum need never be paid, and that she would by her will so provide. The defendant further alleged that deceased did make and execute her will containing said provision for defendant's benefit, but, shortly before her death, wrongfully changed the will, leaving the plaintiff only a comparatively small legacy.

Following the precedents already cited, we held that proof of the transaction, as pleaded in the answer, could properly be established by parol testimony. Answering the objections made at this point to introduction of parol testimony, we said:

"We are not inclined to this view. These instruments [the notes and mortgage] were complete in themselves. The alleged oral undertaking neither added thereto nor detracted therefrom. It did not purport to vary either. It served merely as an inducement to the entering into the written contracts on the terms stated therein. The law is well established that there may be one contract provid-

ing for another, or a contract may be partly in writing and partly in parol."

The same rule has recognition in *Waukee Sav. Bank v. Jones*, 179 Iowa 261, 266; *McCormick Harv. Co. v. Morlan*, 121 Iowa 451. And even though it be conceded, as it must be, that there is difficulty in reconciling all the decided cases found in the books along these lines, we think the statute already cited, Section 3060-a16, Code Supplement, 1913, is quite controlling. It provides, in express words, that "every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument *for the purpose of giving effect thereto*," and that, as between the parties, the delivery "may be shown to *have been conditional or for a special purpose only*." If, without this provision, the rule against parol evidence would operate to exclude proof that a note was delivered to be held simply as evidence of or security for the maker's obligation to pay interest on that sum during the payee's life, and "not for the purpose of giving effect thereto" as a promissory note, then the rule of evidence must, to that extent, give way to the statute.

No written contract is complete without delivery, and delivery consists, not in a mere manual act of passing the paper into the hand of another: the essence of delivery is in the intent of the parties, and it is competent for them to attach thereto any conditions upon which they may agree. Proof of such conditions of delivery does not add to or take from or vary the terms of the writing, but goes rather to the question whether the writing ever became a contract at all, or was delivered for some agreed special purpose, other than the transfer of property in the instrument. If, therefore, we are not to unduly narrow the scope of the statute, and abandon the rule affirmed by us in our prior cases (*Oakland C. Assn. v. Lakins*, *Marsh v. Chouin*, *Ball v. James*, and others hereinbefore cited), we think it

must follow that the appellant's answer in this case is not open to the objection that the matters pleaded cannot be established by parol testimony.

II. Is the answer demurrable as pleading an agreement between the defendant and Scott which is not supported by a consideration?

So far as relates to the alleged agreement between these parties by which defendants undertook to build a home, relying upon the promise of Scott that, if they would so build, he would furnish the money represented by the note, and accept their undertaking to pay him interest on such amount during his lifetime in satisfaction and discharge of the debt, we think it must be held that, when both parties have acted thereon, the money being furnished by the one, and the house built therewith by the other, it constitutes a valid and enforceable contract, and, unless proof thereof is excluded by some imperative rule of evidence, the fact that the interest has been paid or tendered according to the agreement is sufficient reason for denying a recovery at the suit of Scott or his guardian.

But, says counsel for appellee, the defendant seeks to couple with the alleged arrangement a further agreement by Scott to make a will in which he would bequeath the note to the defendant; and such agreement is clearly without consideration, a will having no legal force or effect in the lifetime of the testator, and, even if made, being revocable at his pleasure.

But the plea against which this objection is raised is not an attempt to get the benefit of a will in the lifetime of the testator, for a will can operate as such only from the testator's death. The making of a will may, however, be the subject of a valid contract, and the fact of such agreement may readily become an item of competent testimony

8. CONTRACTS :
mutuality :
interdependent
promises.

4. WILLS : ad-
missible to
prove contract.

in a controversy arising between the parties in the testator's lifetime. Thus, in the case at bar, the agreement to make a given bequest, and the fact that a will of that kind was made, are provable, not to give present force and effect to the promised bequest, but as evidence bearing on the agreement and understanding pursuant to which the money was furnished and the note in suit was made. It is *that* agreement, if one was made, on which the defendant is entitled to rely in this action, and not upon the fact that a bequest was promised, or was, in fact, embodied in a will, this latter fact being pertinent and admissible only as it may lend aid in arriving at the former.

If the answer were to be treated or construed as pleading a mere gift *inter vivos*, or a promise or contract to make a gift in the future, the objection made thereto by the appellee would present a much more serious question; but such is not the nature or effect of the alleged transaction. The advancement or payment of a sum of money, in consideration of which the party receiving it obligates himself to pay the party advancing it a stated annuity or rate of interest for life, does not amount to a gift, in any sense of the word.

There is a valuable consideration furnished by the one party, for which the other assumes a valid and enforceable obligation to pay a specified yearly sum, terminable only by the death of the other party. The promise or agreement, if one was made, to leave the note by will to the defendant would, in such case, be no more than a provision by which the instrument securing the payment of the annuity or interest charge should be surrendered to defendant when the obligation of the contract should be terminated by the death of the annuitant.

The pleaded fact of family relationship between the parties, and that the transaction was influenced, in some degree, by love and affection, is pertinent, not as giving

5. PLEADING:
matters of in-
ducement.

validity to an agreement which would otherwise be unenforcible, but as explanatory of the circumstances under which it was made, and affording a reason why the uncle was willing to deal with defendants on more liberal or more favorable terms than would ordinarily be accorded to mere strangers, in whom he felt no interest.

We conclude, therefore, that the answer is not vulnerable to the objection that it pleads an alleged agreement which, upon its face, is void for want of consideration.

It follows, of necessity, that the trial court erred in sustaining the demurrer, and in rendering judgment for the plaintiff on the pleadings.

The judgment is, therefore,—*Reversed*.

LADD, GAYNOR, and STEVENS, JJ., concur.

IN RE ESTATE OF JOSIAH KEMPTHORNE.

F. E. LAMBERT et al., Appellees, v. REBECCA KEMPTHORNE et al., Appellants.

JUDGMENT: Vacation—Denial of Probate—Affirmative Fraud. An

1 *affirmative* showing of fraud is necessary in order to justify the setting aside of an order denying probate of a will. Evidence reviewed in detail, and held insufficient to show fraud (a) in the conduct of the attorneys, (b) in the manner in which the guardian ad litem acted, (c) in the waiver of a jury, (d) in the failure to object to incompetent testimony, (e) in the belated filing of objections, and (f) in the agreement of beneficiaries under a former will personally to pay certain bequests contained in the will which was denied probate.

JUDGMENT: Vacation—Judgment Against Minors. Principle recog-

2 nized that a minor may have a *regular* judgment set aside only on the same showing required of an adult. (Sec. 4091, Code, 1897.)

Appeal from Polk District Court.—GEORGE A. WILSON,
Judge.

JANUARY 20, 1920.

THIS was an application to set aside a judgment which had been made in said estate, refusing and denying probate of the will. The trial court in this case sustained said application, set aside the prior order and judgment as erroneous, and reinstated the case on the docket for trial. The widow of the deceased and her four daughters, and the husbands of some of them, appeal.—*Reversed.*

Miller, Parker, Riley & Stewart and Miller & Wallingford, for appellants.

T. A. Cheshire, for appellees.

PRESTON, J.—But one witness testified in this case. The other evidence consisted of records, and other documentary evidence. The application in this case, which is denominated petition and motion to set aside, etc., was filed October 25, 1916, and was to set aside the order made August 18, 1916. August 16, 1916, two days before the order denying the admission of the other will to probate, there was filed in the clerk's office an instrument purporting to be the last will of Josiah Kempthorne, deceased, dated November 2, 1907. By this instrument, deceased devised certain real estate to his four daughters, with directions that such property be sold, and the proceeds divided between them. The residue was given absolutely to his wife, Rebecca Kempthorne, who was appointed executrix. The will which was denied probate, and the one now in question, is dated May 12, 1916, and was filed May 22, 1916. Testator died May 13, 1916. In brief, the terms of the last-mentioned paper, after providing for payment of debts, funeral expenses, monument, and the like, make specific legacies to the Organization for the Support of Worn-out

Ministers, Iowa Conference, Associated Charities of Des Moines, Foreign Missionary Society of the M. E. Church, The Association of Des Moines for Sightless Women, Women's Home Missionary Society, Orphan's Home Society, the Church Extension Society; to three of his sons-in-law, \$500 each; to his wife, the life use of all property, subject to her consent to prior bequests. Then follows Item four:

"All the rest and residue of my estate shall be divided into ten equal parts remaining at the death of my wife, and not herein specifically devised and shall be distributed as hereinafter stated, viz.: I give and devise the life use of three of said parts for the sole use and personal benefit of my daughter Rebecca K. Lambert which shall be held in trust by the persons who shall administer my estate and be by them paid to her in person or for her use and benefit solely and for her children but no part thereof shall be for the maintenance of her divorced husband, F. E. Lambert, and at her death said trust fund shall be and become the property of her three children or of such of them as shall be living at her death. To my daughter Mrs. Nettie Hudson I give three of said parts to have and to hold to her in her own right absolutely. To my daughter Mrs. Emma J. Haeseler, and to my daughter Mrs. Pearl Ione McQueen, I give and bequeath to each two of said shares or tenth parts. I have made this division on the basis of the children born to my daughters including to each and to the mother individually a share apiece except in the case of Mrs. Lambert to whom I have previously made advancements."

His wife is appointed principal executrix, and two of her daughters associate executrices. The subscribing witnesses to this were Calvin Yoran and Alton F. Dunham. The value of the estate is \$100,000 or more, the larger part being realty.

May 22, 1916, appellant Rebecca Kempthorne, surviving spouse of testator, filed her written petition for probate of said will. Thereafter, notice of probate was published in a Des Moines paper, fixing June 19, 1916, at 9 o'clock A. M., as the date of hearing. The hearing on the probate of the will was not had on the date fixed in the notice. June 20, 1916, the court, Judge Dudley presiding, made an order reciting, among other things, that the court's attention had been called to the fact that due notice of the probating of the will in question had been given, and that the widow, who filed the will for probate, and who was present at the time of its execution, is in Des Moines, in poor health; and that her testimony can and should be taken. The time of the court being occupied with other matters, however, it was ordered that the widow give her testimony before a commissioner appointed by the court for that purpose, with power to administer oaths, and that her testimony be taken in shorthand, and filed in the case as a part of the record, to be considered by the court in determining whether the will should be admitted to probate. June 22, 1916, the widow, Rebecca Kempthorne, filed a written application for the appointment of an attorney to represent the minors, Rosamond, Frances, and Carolyn Lambert. This paper recites the filing of the will, giving of notice, etc., and that said will makes the three children of applicant's daughter, Mrs. Lambert, beneficiaries; that said children are nonresidents of Iowa; that Rosamond is 16 years of age, and the other two, 9 and 8, respectively; that they have no general guardian in Polk County, and are not represented in this proceeding by counsel. Thereupon, and on the same date, Judge Ayres appointed E. S. Warren, an attorney-at-law of the Polk County bar, to represent said nonresident minors on the hearing of the petition and probate of the will, and in all proceedings which might be had therein subsequent to his

appointment. On June 22, 1916, Judge Ayres made an order in regard to taking testimony, which recites that the prior order embraced the taking of the testimony of only one person, and that there are others whose testimony should be taken. A commissioner was appointed to take the testimony of C. K. Hudson and wife, and any other person who might be called before him, which was likewise to be taken in shorthand, filed, and used on the hearing. On August 11, 1916, the widow, Rebecca Kempthorne, filed a written application, showing that E. S. Warren, who had been appointed to represent the minors, was in the military service, and would be, for some time to come, and that an additional attorney should be appointed, in the absence of said Warren, in order that the minors might at all times be properly represented. On the same date, Judge De Graff made an order appointing Thomas J. Guthrie to represent the minors, with Warren, and, in Warren's absence, in all proceedings connected with the hearing. On the same date, the widow, Rebecca Kempthorne, by Miller & Wallingford, her attorneys, filed a written application for authority to take depositions of the subscribing witnesses to the will, who reside at Manchester, Iowa, and reciting that it is desired that their depositions be taken for the purpose of proving the execution of the will. An order was accordingly made on the same day by Judge De Graff, the minors appearing by Mr. Guthrie, their attorney. The order provided that depositions should be taken before any notary public in Delaware County; that the depositions were to be taken in shorthand or longhand, but, if in shorthand, that a transcript thereof, when certified and filed, should be received in evidence; that the depositions might be taken on either oral or written interrogatories, but that, if on oral, one of the attorneys appointed by the court to represent the minors should be present. On August 18, 1916, the four daughters of deceased, Net-

tie Hudson, Emma J. Haeseler, Pearl Ione McQueen, and Rebecca K. Lambert, filed a paper signed by them, objecting to the probate of the will on the grounds that the instrument is not the will of deceased, in that it does not express his intention, and was not drawn in conformity with his wishes; that, at the time of the execution of the will, deceased was so weakened in mind and body, by sickness and disease, that he did not comprehend the import of his acts, nor the contents of the instrument, and did not know or understand the legal effect of the language used; that the instrument is not, in truth, his last will. On the same date, the widow and her four daughters filed a writing signed by them, reciting, among other things, that, as heirs and principal beneficiaries under the will of deceased, in the will on file, and "being desirous that the wishes of the deceased be carried out, * * * do hereby jointly and severally promise and agree that, in the event the said will of Josiah Kempthorne be set aside, that we will pay, or cause to be paid to each of the parties, persons, or organizations hereinafter named, the amounts set opposite their respective names, the said sums being the amounts of their respective bequests under the terms of the will." Then follows a list of beneficiaries, the parties before mentioned, of bequests amounting to \$7,500. It further provides that said sum shall be paid on or before five years from May 13, 1916, and shall not bear interest until paid. This paper was prepared by Mr. Miller some time before August 18th. Mrs. Lambert was not in Des Moines at the time, and the paper was sent to her, at Tacoma, Washington, for her signature. Mr. Miller testifies that he was not acting for anyone except Mrs. Kempthorne, the widow, and that deceased had been a client of his for a number of years. He also says:

"This case was one where the parties had been friends and acquaintances of mine for years, and their desire was

to have the entire matter presented to the court, that the court might take the matter up, and examine it, and do what was right under the circumstances. If the will should be admitted to probate, the court should probate it; if it should not, and was not the will of Josiah Kempthorne, deceased, it should be set aside."

Mr. Miller also prepared the other orders, and applications for appointments of attorneys, etc. The depositions of the two subscribing witnesses were read. That of Mr. Dunham is brief, and recites the signing of the instrument by deceased and by the two witnesses; that he was not there when the will was being written, having been just called as a witness. The other subscribing witness, Mr. Yoran, an attorney of many years' practice, and the one who drew the will, testifies that he only knew deceased as he met him, when called to draw the will; that the son-in-law of deceased, Rev. Hudson, came to the witness to have him draw the will; that he went to the home of Mr. Hudson, where deceased was. He testifies as to the formal signing of the paper; that deceased was in some critical distress, but acted rational, and apparently comprehended all that was said to him; that he judged him mentally sound, and capable of connected thought; that Mrs. Kempthorne explained to witness the main provisions which deceased desired incorporated in his will; that deceased could talk but very little; that the wife explained to witness different provisions, and deceased gave his assent. In regard to the trust provision in the will, witness testifies:

"Owing to the condition in which Mr. Kempthorne was, after arriving at the house, Mrs. Kempthorne, his wife, had an interview with me, at some length, and during our conversation, she alluded in a vague way to family troubles; and I did not feel at liberty to interrogate her closely, as I had received the impression that time was essential, and assumed that she was advising me of all the

conditions which were necessary for me to understand; and I got the impression from what she said that Mrs. Lambert and her husband were not living together, and that their relations were simply unpleasant, and that it was not to the liking of Mr. Kempthorne that her husband should have the handling of funds he desired to bequeath to his daughter, Mrs. Lambert. I told her that the usual way in which I was accustomed to arrange matters of that kind, and that seemed to be safe, would be to have a trustee appointed, to receive whatever Mr. Kempthorne wanted to bequeath to his daughter, and this trustee would pay to Mrs. Lambert the use of the funds, and that the remainder would go to Mrs. Lambert; and that would be a way of keeping it out of the control or possession of Mr. Lambert. After our talk, she went in to where Mr. Kempthorne was,—I assume she did,—and later called me, and said that the arrangement would be satisfactory. In reading over the will, the language on page 4 was questioned, and, when read as originally drawn, it called forth an explanation that Dr. Lambert was divorced from his wife, and that she had obtained a decree of divorce at some time prior. I then said, had I known that, I would have drawn the will differently: that, if there was a valid decree of divorce, that he would have no control. Something was said then as to whether or no the trusteeship was effectual under these conditions. I said it was, and but little was said in regard to that; and I am not sure whether Mr. Kempthorne asked for any particular explanation; and I thought that to rewrite the will might possibly be too much of a tax on him, but said that I could change it; but it was concluded to sign it as it was made out. Q. Is it not a fact Mr. Kempthorne's condition was such that you did not think you had time to rewrite the will so that he could sign it? A. I thought there was some hazard in the matter of attempting it at that time. Q. If you had known

that Mr. and Mrs. Lambert were divorced at that time, you would have drawn the will differently? A. I would have changed it in regard to the trust provision. Q. And you put it in on account of Mrs. Kempthorne telling you that Mr. Kempthorne did not wish Mr. Lambert to have anything to do in handling of any funds left to his daughter, Mrs. Lambert? A. Had I known the circumstances, I would not have made this provision, but I did not wish to inquire into family matters, and thought that they were simply living apart, and that only unpleasant conditions existed. Q. As I understand it, this trust agreement was drawn by you under a misapprehension of a trust fund, at this time? A. It is true. Q. What appeared to be the physical condition at the time Mr. Kempthorne signed the will? A. I noticed that, about the time the writing was finished, that he appeared to be greatly exhausted, and spoke to his wife, who brought him something from another room,—it appeared to be both tonic and a nourishment required by his condition; and I hastened to finish the writing and his signature, as he was in a very weakened physical condition, and was apparently quite exhausted.”

The testimony of the other witnesses whose testimony was taken, was presented and read to the court on the hearing of the probate of the will, but was not before the trial court on the hearing of this proceeding for a new trial, and is not before us.

On August 18, 1916, the hearing was had before Judge McHenry, and the order recites, among other things, that it was a regular day of the May, 1916, term of the court; that the matter came on for hearing on the petition of Rebecca Kempthorne, widow, for probate of the will; that Miller & Wallingford appeared as attorneys for proponent, and Thomas J. Guthrie and E. S. Warren appeared for the three minors. It finds that due and legal notice has been given, as provided by law, and the court thereupon pro-

ceeded to hear the testimony. It further finds from the evidence that the instrument is not, in truth and in fact, the last will and testament of said deceased, and declares the instrument void, and refuses probate. Mr. Miller testifies that, at the time of the hearing, and after the evidence was introduced, and the evidence heard and depositions read, the trial court stated emphatically that the will could not be admitted to probate, because it did not express the intent of the testator; that he, Miller, made no argument to the court. The trial judge has not testified as a witness, as was the case in one of the cases cited and relied upon by appellees, that he was imposed upon in any way, or that there was anything suspicious or out of the ordinary in the proceedings. Plaintiffs introduced a letterhead of Miller & Wallingford, as follows:

"Jesse A. Miller MILLER & WALLINGFORD

J. D. Wallingford

Attorneys at Law

Des Moines

Thos. J. Guthrie

Oliver H. Miller

E. S. Warren

Suite 302 Youngerman Block

Roy E. Curray

Telephones: Walnut 392"

The evidence shows that Mr. Warren occupied a room in the suite of rooms occupied by the firm of Miller & Wallingford, and rented the room, and paid rent for it to them. Mr. Guthrie was then a member of the bar, and later a judge of the district court; he occupied a room adjoining the firm of Miller & Wallingford, but he rented it from the Youngerman estate. The arrangement of the rooms and the hall and the third floor of the building is described, and that all the people who occupy rooms in the south end of the Youngerman Block, going through the main entrance to the rooms of Miller & Wallingford, enter their reception room, and from there to their several rooms. The undisputed evidence is that Warren and Guthrie had no connec-

tion with the business of Miller & Wallingford; that they were not partners or employees of that firm, in any sense; that there were a number of cases where Judge Guthrie and the firm were opposing each other; that the men who have been in the suite of rooms, and the rooms connected with that suite, for many years have had their names on the letter heads, although not members or employees of the firm; that the only purpose of having their names appear on the letter head was to make a better showing. Mr. Miller further testifies, as a witness for plaintiffs, as to the purpose of the appointment of a commissioner to take the testimony of Mrs. Kempthorne and the Hudsons, who were then in Des Moines ready to testify: that the matter was explained to the judge; that Judge Dudley was trying a case, at the time the first order was made; that he had not conferred with the widow, at the time she filed the petition for probate; that he thinks the clerk received it by mail from Mr. Yoran, of Manchester; that he did not discuss the matter with either Warren or Guthrie; that Guthrie was present at the taking of the depositions of the two witnesses at Manchester; that he had been attorney in the divorce suit between Lambert and his wife; that the hearing was not called up sooner because the witnesses were nonresidents; that the order to take testimony was similar to like orders frequently made; that, in procuring the orders for the taking of testimony, he acted upon the theory that all parties were in court, pursuant to the notice given; that the application for the appointment of attorneys for the minors was that they might be personally represented; that some of the parties, though not all, talked to him in regard to these matters, and those who did talk with him said they wanted the bequests made by Mr. Kempthorne to the institutions, paid; that they voluntarily suggested it; that deceased was greatly interested in the Methodist Church; that, the first time he saw any of the parties after

the death of Mr. Kempthorne, was after the will had been sent down from Manchester by Mr. Yoran, an attorney there; that the widow and two of the daughters then told him that the will was not as deceased wanted it drawn; that he told them he did not know what the court would say about it, but the thing to do was to present the entire matter to the court, and let the court pass on it; that one objection the widow especially had was that, under the will, Lambert might inherit property from one of the children; that they were wrought up about it, because of the feeling that had existed for years between Lambert and Mrs. Kempthorne and her husband; that he had not seen Mrs. Lambert; that the attorney appointed by the court as attorney and guardian ad litem was present, and took part in the hearing on the probate of the will. Mr. Miller, testifying as a witness for the defendants, said that he had known the Lambert minors and their mother for many years; knows that the minors have no property in Iowa, and had none at any time after they removed from the state, about 1914; knows they were not residents of Polk County on September 13, 1916, at the time F. E. Lambert petitioned the court for the appointment of a guardian for the property of said minors, and that they were not residents of Iowa at any time in the year 1916, and have not been since then; knows that they resided in the state of Washington, and still reside there; knows that, at that time, Rosamond was about 16 years old.

Defendants offered in evidence the records showing the filing, on September 13, 1916, of the petition for letters of guardianship, order appointing guardian, guardian's bond, and letters issued; also the withdrawal, on October 9, 1916, of Reed & Reed, attorneys for Lambert; report and resignation of C. M. Young, guardian, and order for hearing of report; petition, October 17th, for appointment of a new guardian; October 21st, order accepting resignation, and

appointing new guardian; October 23, 1916, bond and letters. No notice to Rosamond Lambert or any of the minors is shown. They offered in evidence the petition of plaintiff Lambert, for appointment of guardian, filed September 13th, reciting, among other things, that Rosamond Lambert was 16 years of age, Frances, 9, and Carolyn, 8; that petitioner is a resident of Polk County; that his said children are nonresidents of the state, residing with their mother, who is also a nonresident of the state; that petitioner and Rebecca K. are divorced, and that Rebecca was granted the custody of the minor children; that the minors have no regularly appointed guardian, in Iowa or elsewhere, either of their person or property; that the minors have an interest in real property in Iowa, liable to be lost unless looked after immediately. The petition asks that a guardian of the property of said minors in Iowa be appointed; and that some competent person, other than himself, be appointed such guardian, because of domestic troubles theretofore existing between petitioner and his divorced wife. On that date, C. M. Young was appointed guardian. Later, Young filed his resignation, and a report, in which he states that he was induced to consent to act as guardian on the condition that money would be furnished him to investigate the matter set forth in the petition, which had not been done; that he incurred no bills or expenses in the premises; that he has no property of the minors, and knows of none belonging to them, except such property interest, if any, as is referred to in the petition. On October 17, 1916, plaintiff F. E. Lambert filed a petition for the appointment of H. F. Schoen as guardian, reciting the resignation of Young, and asking that Schoen be appointed. Other proceedings in the guardianship matter were shown, such as fixing time of hearing of the Young report, posting of notice, acceptance of resignation, etc. Defendants also offered in evidence the record of the divorce suit brought by

Rebecca Lambert against F. E. Lambert, and the granting of a divorce to Rebecca Lambert, November 5, 1912, on the ground of adultery, and awarding the custody of the children to Mrs. Lambert, and alimony in the sum of \$75 a month, which has not been paid. The divorce case was appealed to this court, and affirmed. *Lambert v. Lambert*, 165 Iowa 367. Upon the suggestion of the trial court in this case that the only thing in the case was whether or not, on the hearing on the probate of this will, the minors were correctly represented, the defendants suggested that this evidence was offered on the theory that, as pleaded by them in their answer, this is not an action on behalf of the minors to protect any of their property interests, but is, in reality, an action by F. E. Lambert to protect what he deems to be a possible contingent interest which he might have as an heir of the children; that Lambert is acting for himself, and has no standing in court to make these objections, or this application for a new trial; that this is material in the case, unless the court should find that the record refusing the probate of the will was proper. Defendants offered in evidence the record in regard to a damage case, entitled F. E. Lambert v. Josiah Kempthorne and Rebecca Kempthorne, being an action for \$25,000 for alleged alienation of affections of Rebecca K. Lambert from said F. E. Lambert, the trial of which resulted in a verdict for the defendants in that case, and a judgment against F. E. Lambert for costs, which costs have not been paid.

This is the substance of the record in the case, and the matters recited are all covered by the motion to set aside and grant a new trial, and the answer thereto. There are 43 different grounds set up in the application. We shall not set them out in detail, but will consider the different points raised.

On May 9, 1918, the trial court in this case sustained plaintiffs' application to set aside the order denying pro-

bate of the will, and granted a new trial, the order reciting, in part, that plaintiffs appear by Mr. Cheshire, their attorney, and Miller & Wallingford appear for Rebecca, and the other defendants appear by Miller, Parker, Riley & Stewart, their attorneys, and further:

"That the order made by this court on the 18th day of August, 1916, denying the last will and testament of Josiah Kempthorne, deceased, probate, which will was filed in the office of the clerk of this court on the 22d day of May, A. D., 1916, was erroneous, and should be set aside, and that said last will and testament should be restored to the probate docket of this court for hearing and determination, the same as if said order of this court, made on the 18th day of August, 1916, had not been entered."

The application for new trial alleged, among other things, that there was collusion between the defendants, and that they conspired together to procure the order refusing to admit the will to probate, and that the order was obtained by the fraud of defendants and their attorney, and that the defense, by the attorneys appointed to act for the minors, acted in a perfunctory manner; that the purpose was to defraud the minors out of the property given to them by the will. The trial court did not find that there was any fraud, but simply held that the prior action of the court was erroneous. It seems to us that the only ground upon which the prior order could be set aside would be for fraud, and that is the ground relied upon by appellees; and we think no fraud has been shown, unless it be assumed that acts of appellants and the attorneys which are, or may be, consistent with honesty and rectitude of purpose, are construed to be fraudulent. The presumption is in favor of honesty, and fraud must be proved. There is no dispute in the evidence.

1. We have doubts whether Lambert, as the alleged natural guardian of his children, has any standing in the

case, in view of the fact that he is absolutely divorced from his wife, and she has been awarded the custody of the children. It would seem that the very purpose of the trust provision in the will was an attempt to keep the estate entirely beyond his reach. He does not have the custody of the children, and has no responsibility for their care. They are with their mother, in Seattle, Washington. If Lambert can be recognized in the conduct of this litigation, it would simply mean that he is authorized to employ counsel in this proceeding, and in prolonged litigation in the will contest, and possibly make the employment a charge upon the estate of the children, and practically fritter it away, since they have no present right to the property, but a remainder only, subject to the life use of the mother, whose expectancy may be many years. The question was raised in the manner before indicated, but is not covered by the errors assigned. In fact, the question as to the alleged fraud is the principal question argued. In view of the fact that we have reached the conclusion that the case must be reversed on the merits, we do not pass upon the question just suggested.

2. Under our statutes, an action may be brought within five years to set aside a will and the probate thereof, where the will has been admitted to probate without contest, and the right to maintain such action

1. JUDGMENT: variation: denial of probate: affirmative fraud.

is because the statutes permit it. *Kelly v. Kelly*, 158 Iowa 56. But we have no such statute authorizing the setting aside of an order denying probate, except the general statutes authorizing the setting aside of judgments, or granting a new trial, and doubtless the equitable jurisdiction, where fraud is shown. It is not quite clear, from the record, whether this application was made at the same term or at a subsequent term. It was made within a year. The application is denominated motion and petition, and appel-

lants seem to make no serious contention in regard to this.

3. We shall now take up the circumstances, or the more important ones, relied upon by plaintiffs, to show fraud, collusion, and conspiracy. It is plaintiffs' claim that the two attorneys appointed to represent the minors were closely identified with the proponents' attorneys, and that the perfunctory manner in which they performed their duties shows that the minors were not represented and their rights preserved. In the first place, the evidence does not show that the attorneys acted in a perfunctory manner. They, or one of them, went to Manchester, at the taking of the testimony; they were present at the hearing, and appear to have performed their duty. It might be perfectly legitimate that they should have their names printed on the letter heads of other attorneys, and occupy offices on the same floor, or in the same suite. We are asked to assume that, because they had their names printed on the letter heads of proponents' attorneys, and had offices on the same floor, or as a part of the same suite, there was impropriety in their being appointed to represent the minors, and that this shows collusion. We are asked to so hold, in the absence of evidence to show any improper interest in this matter, or collusion, and contrary to the evidence that there was none. These men are shown to be men of standing. We are not prepared under these circumstances, to construe these relations to be fraudulent, when they may properly be construed to be upright; nor does it necessarily follow that they did not perform their duty because they did not demand a jury, and engage in a bitter and expensive will contest. Had they done so, without reasonable grounds, they might have been subject to criticism. Juries are often waived. If the case was fairly presented to the court, no claim of fraud can properly be predicated upon the fact that the case was submitted to the court, as all parties were willing to do. It was, of course, their duty to raise and present

every question and every proper defense affecting the rights of the minors. *In re Guardianship of Kimble v. Dailey*, 127 Iowa 665.

It is claimed further by plaintiffs that the attorneys for the minors did not perform their duty, in that they did not object to the alleged incompetent evidence of Rebecca Kempthorne and C. K. Hudson, and did not object to the orders to take the evidence of such incompetent witnesses. It may be conceded that these witnesses were incompetent, under Code Section 4604, to testify as to any personal transactions or communications with the deceased; but they were competent to testify in regard to other matters. The trouble with plaintiffs' contention as to this is that the testimony of such witnesses was not before the trial court in this case, nor is it before us. There is no showing that any question was asked either of these witnesses that was objectionable. We are again asked to assume, in the absence of evidence, that improper evidence was given, and without objection. There was no occasion for objecting to the orders to take testimony of such witnesses, unless it should have been assumed in advance that the witnesses would be asked to give incompetent testimony. The proper time to make the objection to the witness, under Section 4604, is when the witness is sworn. Plaintiffs also complain that the attorneys for the minors filed no answer to the objections filed by the four daughters. We held, in the case of *In re Jones' Estate*, 130 Iowa 177, 186, that no answer or reply to the objections is required.

These are the more important circumstances relied upon by plaintiffs to show fraud on the part of the attorneys appointed to represent the minors, or that they did not perform their duty. There may be some others; but, under the entire record, we think the plaintiffs' claim as to them cannot be sustained.

4. It is claimed by plaintiffs that the making of the

agreement by the widow and four daughters to pay legacies is a circumstance to show fraud, and that the purpose was to silence such beneficiaries, so that they would not interest themselves in the probate of the will. This might be so. But there is no evidence that it was so. On the other hand, such an agreement may have been proper enough. We are again asked to assume that there was an improper motive. There was no secret arrangement, as in the *Zachary* case, *infra*, to prevent the probate. This agreement was filed on the same day as the hearing,—whether at the same time, does not appear. The evidence, or a considerable part, if not all, had, at that time, been taken. The parties may have considered the possibility or the probability that the court, on such evidence, would set the will aside, and, if it was, that they would be willing to carry out the wishes of the husband and father in regard to bequests to church organizations and others. This they agreed to do personally.

5. It is complained by appellees that the application of Rebecca Kempthorne, by Mr. Miller, for the appointment of an attorney to represent the minors, and for the appointment of a guardian ad litem, and that he prepared the formal orders, are circumstances tending to show fraud and collusion. We fail to see any impropriety in this. Mr. Miller was the attorney for Mrs. Kempthorne, the proponent of the will. If it was necessary and proper that a guardian ad litem, or attorneys, should be appointed for minors, we see no reason why the court's attention should not have been called to the fact that there were minors, and that someone should be appointed to represent them. Had counsel for plaintiff or proponent failed to call the court's attention to the matter, it seems to us he would have been remiss in his duty. We suppose it is done every day, where a plaintiff brings an action against different parties, some of whom are minors, and has a guardian ad litem appointed for the minor defendants. A failure to

do so might have serious consequences. Code Section 3423 provides for the appointment of an attorney to represent minors, and for the substitution of an attorney for the one first appointed; and this was done, in this case. The record does not show, as we read it, that the guardians ad litem were selected by Mr. Miller, as contended by appellees. It was held, in *Harris v. Bigley*, 136 Iowa 307, that the mere fact that a guardian ad litem for infants was appointed at the suggestion of the adverse party, or that such guardian failed to make an active defense, will not constitute fraud authorizing a setting aside of the decree, if it is fairly inferable that the substantial facts in regard to the minors were disclosed to the court.

6. Another circumstance relied upon by plaintiffs is that the objections to the probate of the will by the four daughters were not filed until the day of the hearing. They were filed before the hearing, and that is sufficient. They had a right to file them at any time before. Ordinarily, it would doubtless have been proper for the guardian ad litem, or attorney for the minors, to ask time to investigate and prepare for trial, if necessary. But the case is somewhat out of the ordinary, in this: that the testimony had already been taken, and the attorney for the minors was present, and knew the tendency of the evidence. The proponent and the objectors are shown to have been willing to present the matter to the court, and abide by its decision, whether the will was probated or denied probate.

7. It is thought by appellees that the testimony given by Mr. Yoran, one of the subscribing witnesses, sustains the validity of the will. This evidence has been before set out. This may be so, as to the mental condition of deceased, if this evidence stood alone. What other evidence was introduced, was not before the trial court, nor is it here. It is quite clear, however, even from Mr. Yoran's testimony, that the trust provision in the will was not as the

deceased desired it to be, and that Mr. Yoran did not understand the situation in regard to the divorce, at the time he drew the will, and that Mr. Kempthorne was near the end, and it was thought there was not time to change that provision. Though they finally concluded to let it go, and the will was signed, it was not, as we have just said, as deceased intended. We see no reason why credence should not be given to the testimony of Mr. Miller as to what happened when the court refused to probate the will: namely, that the court said he would not admit the will to probate, in view of the testimony of Yoran. If this was the expressed view of the court, then surely there is no room to claim fraud, even though the court's view had been erroneous. We are, ourselves, inclined to think that there is substance in the reason given by the trial court for not probating the will. The circumstances as to the condition of deceased, and the hurried preparation of the will, have been referred to. Yoran testified that the trust provision was a device of his own to prevent Lambert, as husband, from having any interest in the devised estate, and that the provision was drawn upon Yoran's understanding that Lambert was still the husband of Mrs. Lambert, although living apart from her. His evidence shows that the clause in question was included through his mistake of fact as to the existence of a divorce. The mistake was material, because such clause operates to the benefit of Lambert, in that, if his children died, even during the life of the mother, Lambert would inherit a part of their remainder, and he would thereby be put in a position where he could greatly harass the life estate of his divorced wife.

8. Appellees contend that the filing of the motion and petition to set aside the order denying probate was to correct an error in the judgment, and that, under Section 4091

2. JUDGMENT: vacation: judgment against minors.

of the Code, the minors had twelve months, after they arrived at their majority, to correct the error. This section is construed in *Bickel v. Erskine*, 43 Iowa 213, 222; *Buchan v. German Am. Land Co.*, 180 Iowa 911, 914; *Webster v. Page*, 54 Iowa 461. The holdings are that, where the court has jurisdiction, a judgment is binding on minors, as well as adults, and that they will not be permitted to dispute the judgment, unless upon the same grounds that an adult might dispute it, such as fraud, collusion, or error. The cases cited further hold that "error in the judgment or order," in the statute, is not error in fact, but error in the ordinary legal sense of the term,—that is, error in law; and that it is not allowable for the infant to come in, as a matter of course, with a new defense or new evidence, and try the case over again; and further, that error in the judgment is not for fraud practiced by the successful party. That comes under another provision. In the instant case, there is no error of law apparent on the face of the record. If it be claimed that the evidence did not support the order of court denying probate, it would be essential that the evidence be all presented. Only a portion of it was presented. As said, there is nothing in this record to show that any incompetent testimony given by Mrs. Kempthorne or Mr. Hudson was in the record, or considered by the trial court. As before stated, the main reliance of plaintiffs was the alleged fraud and collusion in procuring the order denying probate. The notice of the presentation of the will for probate, which was given, and the other proceedings had at that hearing, gave the court jurisdiction to determine the validity of the will.

9. Appellees seem to rely on *In re Estate of Zachary*, 165 Iowa 309; but we think that case is readily distinguished from the instant case. There, fraud was alleged and proven. Here, fraud was alleged, but we think it was

not proven. In that case, on the original hearing, no testimony was offered or introduced in support of the will. The subscribing witnesses were not present or called. In the instant case, the testimony of both the subscribing witnesses was before the trial court, and considered by it at the time the will was denied probate. In that case, upon the trial of the application to set aside the order denying probate, many witnesses were introduced, including one of the witnesses to the execution of the will, testifying that deceased was of sound mind at the time of its execution. In the trial of the instant case, on the application to set aside the order, but one witness was called, and the court did not have before it all of the testimony heard by the court on the prior hearing. In the instant case, the trial judge who denied probate stated that, under the evidence, it was clear that the will should be denied probate. He did not testify on the trial of this proceeding to set aside that order. In the *Zachary* case, at the time of the original order, the trial judge was suspicious of the transactions, and testified on the later proceedings to that fact. In the *Zachary* case, at page 316, the court found that there was an agreement that the person named as executor, whose duty it was to present the will for probate, should receive from the interests of the others in the estate, an amount largely in excess of his distributive share, if the contest was carried to a successful issue. That fact was concealed from the trial court, when the probate of the will was denied. There is no evidence of such an agreement in the instant case, nor is the agreement of the heirs to pay legacies such an agreement. This last-named agreement was on file at the time of the hearing for probate of the will, and presumably was before the court. At any rate, there is no showing, as there was in the *Zachary* case, that this agreement, such as it was, was concealed from the court. Other distinguishing features might be pointed out.

10. Appellees invoke the rule that granting of new trials is within the discretion of the trial court. Ordinarily, the motion for new trial is addressed to and heard by the judge who tried the case. Such is not the situation here. But, in any event, the motion must be based upon some of the grounds permitted by statute for the granting of a new trial. In this case, the motion is based upon the alleged fraud in procuring the original order.

We have discussed the principal grounds relied upon by appellees to show fraud. There may be some others; but the opinion is already too long, and we shall not go into further detail. We have examined the entire record with great care, and reach the conclusion that plaintiffs' contention that Mr. Miller, as attorney for proponent, and his client were acting together, to prevent the probate of the will, and to defraud the minors, or that there was collusion between them and the other parties for that purpose, is not sustained by the record. The fraud is not established.

11. Appellant contends that, since the term had expired, so that a motion to set aside the judgment could not properly be entertained, this proceeding must be under Section 4091 of the Code. We think it is unnecessary to discuss this subject further, and only cite additional cases referred to by appellants on the question of the alleged fraud, and to the proposition that, under that section, no showing was made which justified the court in setting aside the judgment. Such additional cases are *Hedrick v. Smith & Reed*, 137 Iowa 625; *Kelly v. Cummins*, 143 Iowa 148; *Harris v. Bigley*, *supra*.

12. Appellants further contend that plaintiffs did not show, on the trial in the district court, that a new trial would result in a different judgment from the one rendered when the will was denied probate, and that, therefore, the trial court erred in vacating the judgment. They claim it is necessary to so show, and cite Code Sections 4094 and

4096; *Reints v. Engle*, 130 Iowa 726; *Johnson, Lane & Co. v. Nash-Wright Co.*, 121 Iowa 173; *Andres & Co. v. Schluter*, 140 Iowa 389.

There may be force in this contention, but since we have held that fraud, and other matters relied upon by plaintiffs, have not been shown, it is unnecessary to discuss this feature.

13. It is claimed by plaintiffs that an injustice was done the minors in setting aside the will; but no more injustice was done them than was done the four daughters of deceased, who filed objections, and are not complaining. If the first will is not probated, the mother of the minors will inherit a sum substantially equal to the property given to them under the trust provision of the last will. If the first will is probated, the estate will go to the grandmother of the minors, and from her, doubtless, to the four daughters, including the mother of these minors. We are impressed with the thought that ultimately these minors will fare as well, and perhaps better, than under the will in question. Of course, this is not the question upon which the case must be and is decided, but the thought is suggested by appellees' argument.

We reach the conclusion that the trial court erred in setting aside the judgment and order which denied the probate of the will.—*Reversed and remanded.*

WEAVER, C. J., LADD, EVANS, and SALINGER, JJ., concur.

BURT JONES, Appellee, v. E. E. SPENCER, Appellant.

TRIAL: Instructions—Applicability to Evidence. Instructions not applicable to the evidence are erroneous. So held where the court directed the jury to consider the adulterous relations between the parties during a time when no such relations were shown.

EVIDENCE: Relevancy and Materiality—Unidentified Letter. Testimony which is without probative force, and which can serve no purpose other than to enable the jury to make a bold guess at the existence of a material and issuable fact, is wholly incompetent.

WITNESSES: Cross-Examination—Unjustifiable Latitude. A cross examination over matters which have no relevancy whatever to the direct examination, nor to any fact in issue, is wholly unallowable.

Appeal from Harrison District Court.—THOMAS ARTHUR, Judge.

JANUARY 20, 1920.

ACTION at law to recover damages for the alleged alienation of the affections of the plaintiff's wife. Verdict and judgment for plaintiff, and defendant appeals.—*Reversed.*

Robertson & Havens, for appellant.

Burke & Welch, for appellee.

WEAVER, C. J.—The plaintiff and his wife, Catherine, were married in 1901, and they lived together, in a more or less intermittent way, until the year 1918. Six children were born of this union, and still survive. In March, 1918, they seem to have had a serious quarrel, after which they ceased to maintain conjugal relations, though the wife did not leave the house in which they lived until September following. This action was begun in December of the same year, and trial was had in January, 1919.

Of the various errors assigned for a reversal of the judgment below, we think it necessary to consider only the following:

I. The plaintiff, in his petition, alleges that the wrongful acts charged against the defendant had their inception in the year 1917, and continued thereafter down to the

1. TRIAL: in-
structions: ap-
plicability to
evidence.

commencement of this action. As a witness on the trial, he testified:

"My wife and I never had any trouble until March, 1917. She acted all right up

to then."

Again, he places the date of the break in their nuptial peace and happiness a year later, saying:

"I never had any complaint about my wife's treatment and affections before March, 1918. I am positive of that."

Other witnesses by whom it was sought to show compromising or improper conduct between the wife and defendant refer to dates in 1917 and 1918. The few other matters spoken of as occurring earlier are of such vague and indefinite character, or so clearly without ground to justify any inference of wrong, that we think it must be said there is no evidence in the record from which the jury could properly find anything of an improper character in the relations between defendant and plaintiff's wife at any time prior to the date fixed by the plaintiff himself. Because of this state of the record, the appellant complains of an instruction given by the court to the jury, in which it is said:

"16. In this connection you are instructed that the plaintiff can only recover for the adulterous act or relation between the defendant and his wife, Harriett Catherine Jones, committed and had within the two years next prior to the commencement of this action, as I have before explained; but you will be permitted to consider testimony with reference to the parties prior to the said two years, for the purpose of showing the situation, acts, conduct, and relation of the parties then, and as bearing upon their situation, acts, conduct, and relation within the period of the said two years."

Of this instruction the criticism is that it is not justified by the record, in that there is no testimony from which

the jury could properly find that there were any adulterous acts or relations between said parties prior to the two years next preceding the commencement of this action. For the reasons already stated, we hold that the exception is well taken, and that the giving of the instructions was prejudicial error.

II. Nora Petroff, sister of plaintiff's wife, who is "not on speaking terms with the defendant," testifying for plaintiff in relation to a time when she says Mrs. Jones was visiting at the home of the witness, was asked by plaintiff's counsel:

2. EVIDENCE:
relevancy and
materiality:
unidentified
letter.

"Q. Did you see any correspondence between Mr. Spencer and Mrs. Jones while Mrs. Jones was there, and while her husband was in the hospital? A. Yes. Q. Do you know what became of it? A. She burned it up. Q. Are you acquainted with Spencer's handwriting? A. No, I couldn't say I am. Q. After you read it, what did you do with the postal card? A. I gave it to Mrs. Jones. Q. How was the postal card signed? A. S. E. E. Q. What are Mr. Spencer's initials? A. E. E. S. Q. You handed this postal card you received from the mail carrier to Mrs. Jones? A. Yes. Q. Did you have a conversation with Mrs. Jones about this card—who it was from? A. Yes. Q. Do you recall what happened to Mrs. Jones that night, if anything,—the night that the postal card was received at your house? A. She went to Missouri Valley, the next day after the postal card came, and stayed all night, and came back the next day."

Each of the questions above quoted was objected to at the time, as being immaterial, irrelevant, and incompetent; and in each instance, the objection was overruled. There is no competent evidence whatever that the card was written by the defendant. Neither this witness nor any other pretends to state a single word of its contents, or the nature or subject of the communication, or, indeed, whether

it contained any communication at all. But from this wholly colorless and meaningless incident, there is sought to be drawn some inference of an adulterous intrigue, because, on the following day, the woman who received the card went to Missouri Valley, the town where it appears she has lived many years, and did not return until a day later. Such a morsel of inconsequential information might conceivably furnish a rich topic of animated discussion for a company of gossips at a quilting bee, but we know of no rule or principle of the law of evidence which entitles it to consideration in the jury room. The objection to the testimony should have been sustained.

III. In cross-examination of the plaintiff as a witness in his own behalf, he was shown an affidavit, dated August 14, 1918, purporting to have been signed and sworn to by

him, to the effect that Spencer had never harmed him or caused him any trouble, and that they had always been and still were friends. Thereafter, the defendant testified

8. WITNESSES:
cross-examina-
tion: unjusti-
fiable latitude.

as a witness in his own behalf. In his direct examination, the alleged affidavit was not mentioned or referred to, nor were his own family or domestic relations in any manner inquired into. The cross-examination, however, was permitted to proceed as follows, appropriate objections to each question being overruled.

"Q. You have had trouble with your wife, haven't you? A. Well, yes—some. Q. And your wife got a divorce from you on the ground of cruel and inhuman treatment, at this term of court? A. Yes. Q. How many of your friends, Mr. Spencer, do you get to make affidavits that they are your friends, and how many affidavits do you have in your possession from men, saying that they are your friends? A. You never asked me for any affidavits. Q. Just the one man, and he was easily imposed upon, wasn't he? A. He

is the only man I have as a friend? No—not that I know of.”

The right of cross-examination is indispensable to the development of truth upon the witness stand, and the courts will not unduly restrict its exercise; but it has its limits, beyond which it cannot go, without abuse of the privilege. A clearer case of such abuse can hardly be imagined than is here presented. The inquiries have no relevance whatever to the direct examination, nor to any fact the truth of which is in issue. The defendant was, of course, a witness, and therefore subject to impeachment, as such; but this should be accomplished, if at all, in the manner provided by law, and not by insinuation or slur or indirection.

IV. Many other errors are assigned, some of which are probably well taken; but what we have already said is sufficient to show the necessity of a reversal. The record, as a whole, is very unsatisfactory, and we are satisfied that the case is one in which the ends of justice will be but served by ordering a new trial.

The judgment of the district court is reversed, and cause remanded for a new trial.—*Reversed.*

LADD, GAYNOR, and STEVENS, JJ., concur.

EMMA A. KEITH et al., Appellants, v. CONWAY SAVINGS BANK, Appellee.

APPEAL AND ERROR: Bill of Exceptions—Preservation of Evidence. In an equitable action, it is essential to the preservation of the evidence as a part of the record on appeal that, under Sec. 3652, Code Supp., 1913, it should be certified, either in shorthand or transcript, and filed with the clerk of the district court within six months from the entry of the decree. This statutory method is exclusive, and evidence was not preserved, when not so certified and filed, although there was a proceed-

ing in the trial court, seeking a correction of the record, in which appellee set forth a transcript of the testimony in question, which was admitted by appellant.

Appeal from Taylor District Court.—THOMAS L. MAXWELL, Judge.

SEPTEMBER 26, 1919.

REHEARING DENIED JANUARY 20, 1920.

SUIT in equity to enjoin an execution sale of alleged partnership property to satisfy a judgment against one of the alleged partners. The alleged partnership consisted of a husband and wife and their two sons. Their business was transacted wholly in the name of the wife, Emma Keith. There was a trial, in the nature of an accounting. The finding of the trial court was that the interest of the execution defendant in the partnership property was in a sum in excess of the amount of the execution, and decree was entered accordingly. The plaintiffs appeal.—*Affirmed.*

Frank Wisdom, for appellants.

McCoun & Brant and *W. M. Jackson*, for appellee.

EVANS, J.—In the consideration of the appeal, the fact questions are determinative. We are confronted with a motion by the appellee to strike the evidence contained in appellant's abstract, and to affirm on the ground that the evidence was not properly preserved and made of record, as required by the statute. The facts put forth in support of such motion are undisputed. The case came on for trial in the district court on April 29, 1915. At the conclusion of the taking of evidence, the record shows the following entry: "Evidence closed by agreement of counsel." A future date was set for argument, May 12, 1915. On the latter date, the following entry appears of record:

"The parties have leave to take further evidence as to

the property claimed by Valma Keith and submit the same to the court as a part of the evidence in this case on final submission."

Pursuant to such order, the parties took the additional testimony of two witnesses. Such testimony, however, was not taken by the regular shorthand reporter of the district court, but, by agreement of both parties, was taken by one Chambers, a stenographer. The evidence so taken was duly transcribed, and was introduced in evidence at the final submission of the case. The final submission was had on December 17, 1915, on which date the decree was entered. The shorthand notes taken by the regular court reporter in April were duly certified by the reporter and judge, and duly filed. A certified transcript thereof was also filed within the statutory time. The final certificate from the trial judge, certifying to *all* the evidence, including the transcript of the regular reporter and of the notes taken by Chambers, was duly signed by the trial judge, June 17, 1916. This certification of the trial judge and transcript of Chambers to which it was attached, were not *filed* until June 28, 1916. This was after six months from the date of the decree. There had been no previous certification or filing of the shorthand notes of Chambers. Under Section 3652, Code Supplement, 1913, and under our previous decisions construing the same, it was essential to the preservation of the evidence as a part of the record that the same should be certified, either in shorthand or transcript, within six months, and that the certification should be filed with the clerk within six months from the entry of decree. *Yetzer v. Wiles*, 91 Iowa 478; *Calef v. Cole*, 93 Iowa 679; *First Nat. Bank v. Redhead N. L. & Co.*, 103 Iowa 421; *Smith v. Wellslager*, 105 Iowa 140.

In resistance to this motion, the appellants dispute no fact or date set forth. Their contention is that the actual identity of the evidence in the lower court is accomplished:

by the practical agreement of the parties. By way of resistance to the motion to strike and affirm, the appellants admit that the testimony of the two witnesses in question was precisely as and what the appellee claims it to be. It appears, also, that there was a proceeding in the trial court seeking a correction of the record. In such proceeding the appellee set forth a transcript of the testimony of the two witnesses in question. The appellants admitted the same fully, and admit the same herein. It is urged, therefore, that the testimony is as completely preserved and identified by this agreement as it could be so done by the certification and filing of the transcript within six months. The argument has its plausibility. But the statutory method of preserving the evidence of record is necessarily exclusive. There is no other method. If the certification of the evidence be not both made *and filed* within six months from the entry of the decree, then the evidence, in a sense, dies, and loses its identity as a part of the record. A right arises to the appellee to have the finding of facts of the trial court henceforth deemed a verity. Assuming that the appellee could waive such right, by agreement or otherwise, or that he could estop himself by conduct from asserting such right, no question of that kind is presented by this record.

The simple fact before us is that the certificate of the trial judge to all evidence, which was *made* within six months, and which was attached to the Chambers transcript, was not in fact *filed* until after the expiration of six months. The evidence as a whole, therefore, was not preserved, and a trial *de novo* here cannot be had.

It can, of course, be plausibly argued that a certification filed within six months and ten days is as credible and satisfactory as one filed within six months, and that a holding to the contrary is purely technical. But the technicality is only such as inheres in all statutes of fixed time and

date. Unless such statutes are applied according to their terms, they have no function whatever. It would be idle, for instance, to provide by statute that a litigant may appeal within six months, if the courts would still hold that an appeal within six months and a day would be entertained.

We see no escape for the appellants upon this record. The motion to strike must be sustained. No question is presented which would not involve a consideration of the evidence. The judgment below must, therefore, be—*Affirmed*.

LADD, C. J., PRESTON and SALINGER, JJ., concur.

LOUISA KERKHOFF et al., Appellants, v. AUGUST MONKEMEIER et al., Appellees.

WILLS: Sanity—Burden of Proof. Sanity is presumed. Burden of 1 proof to show the contrary rests on him who so alleges.

WILLS: Undue Influence—Will Contrary to Attempted Influence. 2 Conceding, *arguendo*, that testator was easily influenced by reason of certain delusions, yet undue influence may not be predicated on the fact that testator was advised to make an *unequal* distribution, when an analysis of the will reveals a distribution of his entire estate by a series of devises practically *equal*.

EVIDENCE: Opinion Evidence—Sanity. Nonexpert witnesses may 3 testify to the *sanity* of a person on no other showing than that they had never, during long acquaintance with the person, observed anything strange, unusual, or unnatural about him.

Appeal from Lyon District Court.—W. D. BOIES, Judge.

JANUARY 20, 1920.

THIS is an action to set aside the probate of a will, on the ground that the testator, at the time of the making of the will, was wanting in testamentary capacity, and was unduly influenced in its making. The cause was tried to a

jury, and a verdict returned for the defendants. Plaintiffs appeal.—*Affirmed.*

T. F. Bevington, E. C. Roach, and Geo. W. Kephart,
for appellants.

Simon Fisher and T. E. Diamond for appellees.

GAYNOR, J.—On the 17th day of April, 1902, Henry Monkemeier executed the following will:

“(1) It is my will that all my just debts and my funeral expenses be paid as soon as conveniently may be done after my decease.

“(2) All the rest, residue and remainder of the property and estate, real, personal, and mixed, of every name, nature and description, of which I die seized or lawfully possessed, I give, devise and bequeath to my two sons, August Monkemeier and Frederick Monkemeier, share and share alike, subject, however, to the following bequests and charges which I hereby make a lien upon and charge against my said real estate:

“(a) To my five daughters, Louise Kirckhoff, Mary Billings, Elizabeth Hamilton, Emma Monkemeier and Martha Monkemeier, I give each the sum of one thousand dollars, to be paid to them by my said two sons within one year after my decease.

“(b) To my adopted daughter, Linda Monkemeier, I give the sum of one thousand dollars, to be paid to her by my said two sons when she arrives at the age of eighteen years. I further direct that until said Linda Monkemeier arrives at the age of eighteen years if she lives so long, or if not, so long as she shall live, she shall have from my estate a support, maintenance and education equal to that which has heretofore been enjoyed by each of my said five daughters and such as she would have had if I had lived and she had remained a member of my family. The cost of such support, maintenance and education shall be paid equally

by my said two sons from the property and estate herein devised and bequeathed to them.

"(3) In case before the vesting of the devises and bequests herein given, either or any of my children should die, leaving a child or children, the devises and bequests to any such decedent shall go to his or her descendant or descendants. If either or any should die without children, if the decedent is a boy, his devise and bequest shall go to his brother; if a girl, her bequest shall be divided equally among my remaining children, the heirs of any decedent taking their parents' share. If both my sons should die without issue, then my property and estate shall be equally divided among all my remaining children, the heirs of any decedent taking their parent's share. In construing this paragraph, my said adopted daughter Linda shall be deemed and counted as one of my children.

"(4) I nominate and appoint my son, Frederick Monke-meier, to be the guardian of the person and estate of my said adopted daughter, Linda Monkemeier, and desire that if possible she shall have a home with him until she become of the age of eighteen years, the expenses of such home being paid as hereinbefore provided.

"(5) I nominate and appoint my friend Frederick Thies to be the executor of this my last will and testament."

At the time the will was made, deceased was a resident of Lyon County, and had eight children, seven of whom were born to him, the eighth being an adopted daughter. Of these children, six were girls and two were boys. The will was made in Freeport, Illinois, and left in deposit in the Savings Bank of Freeport until his death, which occurred on the 13th day of October, 1915. At the time of his death, he was about 70 years of age. The will was duly admitted to probate in the district court of Lyon County, Iowa, on the 18th day of February, 1916. This action was begun on the 14th day of September, 1917. The plaintiffs are the

daughters of Henry. The defendants are the sons and the adopted daughter. At the time of the making of the will, the deceased was a widower. His wife died in 1887, just prior to his coming to Lyon County. He took up his residence in Lyon County in 1887. He never remarried.

This action is brought to set aside the probate of the will on two grounds:

(1) That Henry, at the time of the execution of the will, was of unsound mind, and did not possess testamentary capacity.

(2) That its execution was procured by undue influence exerted upon him by the defendants, his sons, and by Frederick Thies and William Washer, and does not express or represent his will in the matter.

The defendants appeared, and denied the allegations upon which plaintiffs based the right to have the will set aside.

The cause was tried to a jury. At the conclusion of the evidence, the court withdrew from the jury the claim of undue influence, and submitted only the other question.

to wit, the testamentary capacity. The jury

1. **WILLS : sanity :** returned a verdict for the defendants, and
burden of
proof. this verdict establishes the ultimate fact

that Henry, at the time of the making of the

will, did possess testamentary capacity. However, the jury was not required to go so far as to determine that matter affirmatively. Their verdict would have support, if the evidence offered failed to affirmatively show that he did not have testamentary capacity. The burden is on the plaintiffs to show that he did not, and the verdict indicates a failure on the part of the plaintiffs to carry this burden to a successful issue. The presumption is in favor of sanity. The presumption is that he was capable of making a will. A failure to prove, by a preponderance of the evidence, the facts upon which plaintiffs predicate their right to the re-

lief prayed for, justifies the verdict. *In the Matter of the Will of Coffman*, 12 Iowa 491; *Webber v. Sullivan*, 58 Iowa 260.

Before proceeding to a disposition of the errors relied upon, it is well that we have before us somewhat of the life and character of the deceased and his mental make-up, together with his relationship to and conduct towards those who are now contending against, and those who are seeking to support, the instrument in controversy.

The deceased, Henry Monkemeier, was born in Germany. He came to this country when he was nine years of age, and located in Freeport, Illinois, where he worked on a farm. When he reached manhood, he married at Freeport, and as a result of such marriage, seven children were born to him, five daughters and two sons. The five daughters are the plaintiffs in this case. The sons and an adopted daughter are the defendants. The adopted child was his granddaughter, and was adopted by him when but a small child. Her mother was Henry's daughter, and is known in this record as Emma Burnett. At the time of the making of the will, this adopted daughter was about 7 years of age. Louisa, his oldest daughter, was born in 1872, and was therefore, 15 years old when her mother died, and 30 years old at the time the will was made. At the time of the mother's death, Martha, the youngest daughter, was but 2 years old. About 6 months after the mother's death, Henry moved to Iowa, and onto a farm in Lyon County, purchased by him about a year before the mother died. On this farm he constructed what appears to be a very comfortable and well-appointed home. In this home he gathered his boys and girls. The boys were younger than any of the girls except Martha. The utmost harmony seems to have prevailed in the household. All the children appeared and testified in this case, and none complain of the father's care, nor does it appear that any controversy, any dissension, any

dissatisfaction arose between the father and the children, or among the children themselves. They lived harmoniously. Each did his bit. Louisa, the oldest, at first took the mother's place in the household, and the others helped in the home and in the field. Each, as he grew in strength, performed the task assigned. No child complains of any conduct on the part of the father towards himself. Indeed, there is a tacit concession in this record that the best interests of his children were the dominating thought of his life. He was an independent thinker, and held a hostile mind against those social forms that sin against the strength of youth—those sickly forms that err from honest nature's rule. He believed in righteousness; believed that the mother ought to be the dominating spiritual influence of the home; that through her the children had come into the world; that by her their lives should be directed into the paths of righteousness. He taught that the plastic mind of the child found its first and lasting impressions in the home; that in its early years it easily yielded to impressions, to teaching, to example, to precept; that in its maturer years the teaching, the example, and the precepts of the home would be of controlling influence on its life; that the baptism of righteousness should come to the child in the home, and through the mother. So he said that "the mother is the baptizer of her children. She gave them the first birth, and on her is imposed the duty of the second birth." So he taught that the duty of the mother to the child was not performed, completed, or sufficient when she took the child by the hand and led it to the altar of the church to be perfunctorily baptized; that such baptism was a mockery and blasphemous; that baptism was nothing, except as the outward and visible sign of an inner and spiritual grace. Though he often spoke harshly of preachers, though he sometimes condemned their methods, though he sometimes questioned their sincerity, though he sometimes ex-

pressed the thought that churches did not come up to the full measure of responsibility that they assumed as teachers and leaders of men, yet, with all, we are impressed with the conviction that this man was intensely religious. His religion may not have been of the orthodox kind. He was not wedded to creeds or dogmas. He was an intense reader of the Bible. He read it and interpreted it in his own way. He believed implicitly in the teaching of the Bible. He believed it is our constitution, our supreme law. He wanted to be guided by it. He sought for the truth in it, and out of his reading he gathered the thought that the preachers to whom he listened were not expounding it so as to bring to the people a knowledge of its spiritual meaning. As he said in his letter, which has been introduced in evidence, and upon which is predicated the thought that he was suffering from chronic delusional insanity:

"The preachers nowadays and in all days have preached the dead Christ, and get no further. They all preach that, 1908 years ago, the Jews crucified Christ, the Son of God. The people read the same story in the Bible, and pity Christ, and get no further. It seems they never catch onto the real meaning of the story of Christ. Church, church, and nothing but church is all that the people believe nowadays. Righteousness is a thing of the past. The Bible doesn't teach that a person must go to church and be baptized with cold water. That is mockery. The mother is the only baptizer. This is her duty. If she neglects this, we cannot expect the people to be good. It is my best and strongest belief that, if mothers bring up their children in a good, mannerly way, learn them good manners, learn their children not to lie, direct or indirect, she is doing her duty. The person that lies crucifies Christ. The mother is the only baptizer. She gives birth to the first man, and ought to give birth to the second man, the new man. This is God's command. If she don't baptize her children with God's

command, they will never be baptized in all their lives. Mothers should do this with their own common sense. Let churches and pastors go to the dickens. Common sense is the Bible. Common sense is wisdom from the Bible. The Bible is our constitution in this world. God is a spirit, and the Bible is written in spiritual meaning. Everyone can read it, but all cannot catch the real meaning. A great many mothers bring their children in the right way, in spite of all the churches, but the majority do not do this. The church is in the way. The mothers don't believe in their own common sense. The pastor has got them so they believe in nothing but the church, going to the pastor, and having their children baptized. They don't lay any weight on righteousness. Let the children grow up afterwards according to their own will."

He goes on to say further that the mere going to church, the mere taking of children to the church for baptism and then abandoning them to their own devices does not make them good Christians; that, even after going to church and being baptized, they grow up to manhood without belief, without any belief in baptism, or in the church. He says further:

"And so we are here in this world of nowadays. Some are good and some are bad. My opinion, with all the wisdom I have from the Bible and my own common sense, is that the public school, no other school, is the most needed thing in the world for the betterment of people. The betterment must be founded in the home and in the public school, and what is most needed is the mother and her teaching. The word 'Christ' must be translated in our language. It means righteousness, and only through Christ (righteousness) can we come to God and Heaven. Our constitution is founded in righteousness, but what would it amount to if the majority of the people rejected the law of our country?"

The excerpts above were taken from a letter written by

the deceased in 1908, six years after the will in controversy was executed. He seems to have entertained and expressed these ideas before and at the time the will was made. Another letter was introduced in evidence, written in 1912. This letter was written, we take it, to his daughter Mary, and some friends. In this letter he dwells on the same subject, and says:

"Now, Rosetta, be careful how you read this. I don't claim that the people who don't go to church are good or in the right, by any means. I believe in the teaching of the Bible, but the Bible is no story book. It is the print on the wall. Everyone who knows how to read can read it, but everyone cannot catch its real meaning. I believe everyone must be born anew. He must be baptized, or be an Anti-christ. The mother must do this baptism, as it is the mother that gave birth to the first man. She must likewise bring forth the second, the new man, in her children. The mothers of today do not believe in this kind of baptism, because the church belief is in the way. The mothers believe what the pastor says, bring the children to the church, and have them baptized with water. Water doesn't baptize anybody. Now, Rosetta, don't content yourself with what I write. Examine the matter yourself in your neighborhood. Do the mothers pay attention to this main, genuine bringing up of their children? Do you believe that the pastors can do what the mothers ought to do? What do the people go to church for? They don't go to church for fun. They got something on their minds. They are hunting Christ in the church. Christ is not in the church. The church is nothing but an empty, worthless building, the same as when we read in the Bible the two disciples came to Christ's grave, and found nothing but an empty grave, and some sweat rags, and that same morning a woman saw Christ, and he told her, 'Tell the children where I am.' So it is the woman, the mother, that must baptize her chil-

dren right from the start. A pastor can do all the preaching and teaching, but to start at the hind end is a mistake. The pastor preaches to the people of Christ, and he doesn't know who Christ is. He likes the cream, and the people get the whey. The church belief is only the shadow of real Christianity. The outward dress don't make the man. A person must be a Christian within. Don't throw your good common sense away. Christ is not dead, as people believe. Christ is only dead in the people without righteousness. God gave people thoughts. They are the guide. If we nail our good thoughts fast, hands and feet, and obey our bad thoughts, the devil is our God."

A new subject is introduced in this letter. His ideas on this subject are made the basis for a claim of delusional insanity. He says:

"Just think of the suffragists! It is a new sentiment sprung up in this country—a new kind of weed. What kind of fruit it will produce we don't know. Women are complaining. They want the equal right with the men to vote. How are you fixed, Rosetta? Do you want to go to the polls and vote? Now, Rosetta, without asking, I know that you don't, and your Aunt Minnie,—not at all. I know her too well. I have known her for a long time, too. She has stuck to her own duty, and has done it remarkably well. I have seen no one yet that could beat her. I have always had my eyes open, too. When the time comes when all the women go with the men to the polls to vote, there will be some fun then on election day. The automobiles will run over the road like wild buffaloes with a prairie fire behind them. The house and the children will then be left at home to the mercy of whatever. The suffragists will elect Carrie Nation for our president, and then just imagine! She, with her hatchet, will cut all the saloons to slivers, and with all her women officials, each with a broom, will sweep the saloons off the face of the earth, and then we will have tea

parties. Then the teacups will steam to burst, and the little cups and saucers will clatter to beat beer glasses. Now, Rosetta, I have written you a lot of nonsense. Can you beat it? But when it comes to facts, I am at my post, too. I don't believe in this silly monkey work, that a woman should go to the polls and vote. I believe a woman should wear her own dresses. She should tend to her own business at home; make a good home and live a good decent life. What is a woman good for if she neglects her duty at home? Is she here to hang style on? We can hang style on a fence post. I consider a woman too good to use her for a monkey toy, or to hang style on."

We have set out this much because this is practically the only basis upon which contestants founded their claim that Henry Monkemeier was subject to chronic, delusional insanity, incapacitating him from making a will; and this is the only foundation, practically, upon which they rest the claim that he was so weak mentally that suggestion was sufficient to bend his will to the will of another.

We will not take up the errors relied upon in the order in which they are presented in argument by counsel, but will dispose of all that, under this record, we deem possessed of any merit requiring any discussion.

It is claimed that the court erred in withdrawing from the consideration of the jury the claim of undue influence. Counsel concede,—and counsel could not do otherwise, under this record,—that, in all the ordinary

2. WILLS:
undue influence: will contrary to attempted influence.

affairs, of life, in the relationship to his home, his family, and his friends, in the discharge of his public duties, and in the management of his private affairs, Henry Monkemeier possessed no hallucinations, and was absolutely normal. Indeed, nothing appears in this record even tending to show that there was anything abnormal, unnatural, or unusual in his conduct, or in his speech quoted above.

It is claimed by counsel that, on the question of undue influence, these vagaries or idiosyncrasies or "delusions," as counsel calls them, disclose a condition of mind that made it easily subject to any influence which might be brought to bear upon it, when urged to act to the prejudice of the natural rights of the daughters in the distribution of his property. Certainly, the entertaining of these ideas, peculiar though they may be, and unorthodox,—though smacking strongly of good common sense,—does not bear evidence of irrationality such as destroys in its possessor the capacity to make a valid will. Mere weakness of the mental powers will not render a person incapable of making a valid will, so long as he retains mind enough to know and comprehend, in a general way, the nature and extent of his estate, the natural objects of his bounty, and the disposition he desires to make of it. See *Perkins v. Perkins*, 116 Iowa 253. All these he possessed, and, unless his peculiar notions touching baptism and suffrage tend in some way to show that it created in his mind some feeling or sentiment against women, and, indirectly, against his daughters, which, when played upon by the fingers of designing men, led him to disregard their natural claims upon him, it cannot have any consideration.

But, even if this could be rightly claimed for it, there is no evidence that this discordant string was played upon. There is no evidence that these boys even knew that he had made a will, until the year 1915; that these boys ever spoke to him about making a will. The only evidence that anything was ever said or done by those charged with using undue influence, is found in testimony tending to show, or showing, that Henry accompanied a friend on a visit to Germany in 1902; that, prior to his going, his friend Thies advised him that he would better make a will, before he left for Germany, and that he would better give the boys the best of it. Henry replied, in substance, that "the law makes

a disposition of property that is fair and just. My daughters are as dear to me as my sons. I am satisfied with the disposition that the law will make of it." However, on his way to Germany, he stopped at the town of Freeport, to visit a friend, and while there, this will was made, and left on deposit in the bank. None of those charged with having undue influence over him were with him at the time the will was made, nor does it appear that anyone knew, at that time, that he contemplated making a will. He made it, however, and a very noticeable feature of this will is that it emphasized what Henry told Thies, when Thies urged him to make a will giving the boys the best of it. At that time, Henry had 194 acres of land. The record shows it was worth from \$35 to \$50 an acre. Figuring it at \$47.50, as a fair valuation, it would be worth at that time \$9,215. It will be noticed that he gave to his five girls and his adopted daughter \$1,000 each, and he made the same a lien upon and a charge against the land bequeathed to the sons. It will be noted further that it is provided in the will that the sons should support the adopted daughter, who was then but 7 years of age, until she was 18 years of age. Figuring, therefore, we find that the land, which was worth the sum above named, had impressed on it what would be equivalent to \$7,000, leaving a balance to be divided between the sons of approximately \$2,215. So it is apparent that, even if what were claimed to be hallucinations might have had the effect of prejudicing him against his daughters in the disposition of his property, even though it might be claimed that what was said by Thies to Henry might have influenced him in making the disposition of his property, it is certain that he was not influenced by it.

Under no theory of the case, giving to all the testimony of the plaintiffs its greatest probative force, would a jury be justified in saying that the testator was unduly influenced in the making of the will in question. The subject

of testamentary capacity and undue influence has been so frequently considered by this court that we do not feel like incumbering this record with a discussion of our prior decisions upon these questions. The trend of all the decisions is to the effect only that any testimony which tends to show weakness of mind, that tends to show a condition of mind that would render the possessor easily influenced, or might render him easily influenced, is competent upon the question of undue influence, when it is shown that some influence has been exerted that might have the effect of subordinating his will, in its then condition, to the will of a stronger mind. The weaker the mind, the less influence it takes to subordinate it to the stronger. But where we find a mind strong, dominating, and self-asserting in all the ordinary affairs of life, it takes a stronger showing, to find subordination to the will of another, than when the mind and body are enfeebled by age or weakness, or any of those things which tend to affect its stability and power of resistance. The possession of hallucinations or delusions is not, in itself, sufficient. It must be shown that the influence was exercised along the line of the hallucination, and that the act called in question is the product of the hallucination or delusion; for a person may be entirely sane on all other subjects, and capable of making a valid will, even though he possesses insane delusions. Unless it is made to appear in some way that the act was the result of a delusion, or that he was influenced by it in doing what he did, or that, without this operating upon his mind, he would not have done what he did, proof of the delusion is insufficient to defeat his act. The fact that the testator is a spiritualist, and entertains the views of that sect, is not sufficient in itself. See *Otto v. Doty*, 61 Iowa 23; *In re Will of Dunahugh*, 130 Iowa 692. Indeed, there is not found in the books a well-considered case in which it has been held that the showing made here is sufficient to justify a jury in saying

that the will in question was the result of undue influence.

Proof of mere opportunity does not sustain a contention that the opportunity was taken advantage of. No act is shown in which the testator surrendered his will to those charged with having unduly influenced him. For the purposes of this case, we might concede that he entertained insane delusions touching baptism; but not all insane delusions render one incapable of making a will. A man may possess all the mental qualities essential to the transaction of even intricate business, and yet have delusions about other matters which do not affect or concern the act which he is required to perform. There must be some relationship between the act charged to be the product of the delusion, and the delusion found to exist.

So we say the court was right in not submitting this question to the jury. A verdict for the plaintiffs on the theory of undue influence, operating on the mind of the testator at the time of the making of this will, subordinating his will to the will of the parties charged with having exercised undue influence, would have no support in this record; and we pass this contention of the plaintiffs without further comment.

Assuming that the record was rightly made, and no error committed prejudicial to the plaintiffs' rights in the making of the record, we have to say that the plaintiffs have failed to carry the burden they assumed to a successful issue. Though not necessary to the determination of this case, we are of the opinion that, under the record made, the verdict of the jury is supported by a great preponderance of the evidence.

We have further to say that, under the record made, it would not have been error for the court to have instructed the jury to return a verdict for the defendants.

This brings us to a consideration of the other errors assigned.

It is claimed that the court erred in the making of the record that went to the jury, to the prejudice of the plaintiffs. It is claimed that the court erred in the admission and rejection of evidence, and our attention is especially called to the rulings of the court which, it is claimed, were prejudicial to the plaintiffs. Thirty-three assignments are made on which error in this respect is predicated. No good purpose would be served in reviewing specifically these several points. They are all governed by well-recognized rules. We have examined each error assigned, and the ground upon which error is predicated, and nowhere do we find the ruling of the court prejudicial, in the light of what preceded and followed the matter called in question. Some of the questions were of that character and so framed as to call for conclusions and comparisons not warranted by anything in the record. Others called for conclusions of witnesses, rather than for the statement of facts. Others were not cross-examination.

Objections are urged to the testimony of nonexperts, called by the defendants to testify to the sanity of the testator. These witnesses were well acquainted with the testator; had known him during all his later life; had observed his conduct before and during the time when it was claimed he was controlled by delusions; and testified that he was, in their judgment, of sound mind. The objections to this testimony are based on the thought assumed that the testator was suffering from "chronic delusional insanity," or paranoia, and that these witnesses were not competent to testify on that subject. They were competent, however, to testify that they observed nothing strange or unusual in his manner and conduct, indicating an unsound mind. Their right to testify is bottomed on the thought that men who are possessed of hallucinations, who are insane or unsound in mind, give some manifestation of that

8. EVIDENCE:
opinion evi-
dence: san-
ity.

condition in their intercourse with other men. Where one has known a person for a long time, has seen him in the transaction of business and in social life, and has observed nothing in his demeanor strange or unusual or unnatural or inconsistent with rationality, he is competent to give his opinion that he is of sound mind. Unsoundness of mind makes itself manifest, and, before one can be called to testify that someone is of unsound mind, he must be able to detail and place before the jury some manifestation observed by him inconsistent with rationality, and his opinion then is based upon those observations, and must be weighed by the jury in the light of the revelations made by the witness touching the things he observed. The normal man ordinarily is not distinguishable in his talk, manner, or conduct from all other rational men. The irrational man, the man of unsound mind, may or may not manifest the condition of his mind in his conduct, speech, or intercourse with men; but one who is called to testify that he is of unsound mind must be able, before giving his opinion, to point to some manifestation which indicated a mind in some way abnormal.

It is next contended that the court erred in its instructions to the jury.

We are not pointed out definitely to anything in the instructions which is not in harmony with the law that does govern, and ought to govern, a jury in determining the question involved in this case. We have read those instructions with care, and find that they fairly state the law, and certainly were in no way prejudicial to any rights of the plaintiffs in this case.

It is next contended that there was misconduct of the jury. Charges were made, impeaching the integrity of the jury. Proof of this was submitted to the court on affidavits. There were counter affidavits filed by the jurors whose integrity was called in question. The proof offered by appel-

lants is insufficient upon this point, and justifies us in saying that the charge has no fact foundation to rest upon.

Upon the whole record, we think the plaintiffs have had a fair and impartial trial. We see no ground for reversing the action of the court. Its judgment is, therefore,—*Affirmed.*

WEAVER, C. J., LADD and STEVENS, JJ., concur.

H. C. KORF, Appellee, v. CLAUDE A. HOWERTON et al.,
Appellants.

APPEAL AND ERROR: Harmless Error—Dismissal of Codefendant.

- 1 Where the appellant was not entitled to recover, in an action to redeem land from a foreclosure sale, any error in dismissing a party who was made such merely in aid of an auxiliary accounting was harmless.

VENUE: Rights of Nonresident Third Party. In an action to re-

- 2 deem from a foreclosure sale, wherein a third party, who was a nonresident of the county, was brought into an auxiliary accounting, where it appeared that plaintiff was not entitled to redeem, such third party had a right to demand that he be dismissed as a party, on the ground that the action for accounting was purely a personal suit, and that he had a right to have it tried in the county of his residence.

MORTGAGES: Foreclosure and Redemption—Appeal from Fore-

- 3 closure Judgment. The right to redemption of land sold under a mortgage foreclosure is, under Sec. 4045, Code, 1897, cut off by an appeal from the foreclosure judgment.

MORTGAGES: Foreclosure and Redemption—Presumption of Regu-

- 4 larity of Sale. A recital in a sheriff's deed that the sale was made in accordance with the order of the court, and in pursuance of the statute in such case made and provided, in a case where it is claimed that the sale should have been made without right of redemption, did not show that it was made subject to right of redemption within a year, as there would be a presumption in favor of the regularity of official conduct, and such recital tended to establish that the sale was, in all respects, regular.

MORTGAGES: Foreclosure and Redemption—Premature Issuance of
5 **Deed.** The premature issuance of a sheriff's deed, before the expiration of time of redemption, is a mere irregularity, and does not invalidate the sale or deprive the judgment debtor of the right to redeem, and the title remains in him until the expiration of the time allowed for redemption. Secs. 4044, 4045, Code, 1897.

Appeal from Monroe District Court.—D. M. ANDERSON,
Judge.

OCTOBER 23, 1919.

REHEARING DENIED JANUARY 20, 1920.

THE main suit involves whether the defendants are now entitled to redeem from a foreclosure sale, under which plaintiff claims title. In course of this suit, appellee Chester Sloanaker was made a defendant in cross-petition and on his motion the allegations impleading him were stricken. Defendants appeal.—*Affirmed.*

Liston McMillan, for appellants.

D. W. Bates and *Morgan & Korf*, for appellees.

SALINGER, J.—I. The plaintiff alleges that he owns the lands in dispute in fee simple, and he rests his claim of title on a sheriff's deed, which was the culmination of the foreclosure of a mortgage by the Newton Savings Bank. He asked and obtained a writ of possession and judgment for damages. This petition was met by the defendants Claude A. Howerton and Cynthia A. Howerton with a claim that the foreclosure sale is void. The prayer for affirmative relief is that redemption be now allowed, in time and on terms fixed by the court. In a cross-bill, to which Chester Sloanaker was made a defendant, it is asserted that defendants are entitled to an accounting between themselves and Sloanaker; that such accounting is a proper auxiliary to their demand for permission to redeem; and that upon the result

of such accounting will depend the amount the defendants must raise in order to make redemption. In other words, defendants claim that the plaintiff may rightfully be affected by the result of the said accounting, and that, therefore, Sloanaker should be retained in court, so that all matters between the parties may be adjusted in this one suit, including the source and amount of the redemption money. Sloanaker does not live in the county where the suit is pending. A motion to strike the allegations that impleaded said Sloanaker, and to strike them because the demand for an accounting was purely a personal action was sustained, and this appeal is from that ruling.

II. Confessedly, Sloanaker was brought into the case because deemed a necessary party to a confessedly auxiliary accounting. In other words, appellants concede that Sloanaker was rightly eliminated from the cause

1. APPEAL AND
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defendant.

if the accounting prayed was an attempt to get independent relief. They concede the main issue was who had the title to real estate lying in Monroe County, and base their contention that Sloanaker should have been retained as a party on the claim that the accounting prayed was auxiliary to a suit necessarily brought in Monroe County, and that, therefore, he should have been retained, though he was not a resident of that county. Appellants argue that this appeal is from nothing but the elimination of Sloanaker on motion asserting that he was a nonresident of Monroe County, and therefore we have no concern with whether the appellants have the right to recover in the main suit. We cannot concur in this position. True, the appeal does not involve, as an independent proposition, whether appellants are entitled to redeem. None the less, the question may become controlling. For, if appellants cannot prevail in the main suit, as matter of law,—are not entitled to redeem,—then any error in dismissing a party who is made such merely in aid of an

accounting which is auxiliary to the main suit is necessarily harmless error. If the appellants must fail in the main suit, it is foredoomed that they must fail in the auxiliary. A suit which cannot be maintained of necessity carries down its incidentals. And if no relief can be had in the auxiliary accounting, it necessarily follows that it is immaterial what disposition was made of the parties to such an accounting. If, then, the appellants are not entitled to redeem, then, on their appeal from the dismissal of a party to the auxiliary accounting, such accounting

2. **VENUE:** rights of nonresident third party.

must be treated as a purely personal suit. As to such suit, the nonresident had the right to demand that he be eliminated. He had a right to have that accounting tried in the county of his residence.

On analysis, it appears the appellants concede that the fate of their appeal does depend upon whether they can prevail in the main suit. They concede "that the ground of the motion to strike would be good, were it not for the fact that appellants' counterclaim and cross-petition are based on their alleged right of redemption in the land in Monroe County, and an accounting auxiliary to the redemption, said accounting being necessary to redeem." Again:

"The action is bottomed on the redemption and an accounting auxiliary thereto of an open account owned by Sloanaker."

Again, appellant concedes that:

"If this court should, on its own motion, look into the counterclaim and cross-petition, and find that no cause of action is stated against Korf, or, if there is one alleged, that the cause of action against Sloanaker is not germane to the action against Korf, it might be justified in sustaining the motion to strike on the ground of nonresidence."

III. We therefore turn to the standing of the main suit. The appellants assert, in cross-petition, that they own the

land in question by deed from one Van Maren. Van Maren recovered a judgment on October 13, 1910, upon which execution issued on October 25, 1910; sale was had and execution satisfied thereby on November 30, 1910; and deed by the sheriff to Van Maren was executed on December 1, 1911. The Van Maren title was extinguished by the foreclosure proceedings on the mortgage of the Newton Savings Bank, unless the sale by the bank is invalid; for the bank foreclosure rests on a mortgage executed on May 27, 1910. On decree of foreclosure on April 18, 1913, and on execution issued on July 7th of that year, on July 16th the then owners, including Cynthia Howerton, appealed from the decree of foreclosure. There was no supersession, and the sale proceeded, notwithstanding the appeal, and was had on August 9, 1913. On February 10, 1914, there was an affirmance on said appeal. On May 22, 1914, the sheriff's deed upon which this plaintiff relies was executed, his claim of right being based on quitclaim deed to him, made by the grantee in the sheriff's deed, on October 2, 1915. The cross-petition of these appellants, in which they seek a right to redeem, was filed on November 13, 1917, or more than three years after the said sheriff's sale. We cannot find that appellants made any effort to redeem from the sale, except in said cross-petition. Now, if this be all, certainly the appellants are not entitled to redeem. The right of redemption was cut off by the said appeal from the foreclosure judgment on the Newton bank mortgage. Section 4045, Code, 1897. We need give the claim of the appellee that the judgment on the first appeal worked an abatement, or constitutes an adjudication, no consideration. Without reference to that, the fact that the present appellants took said other appeal from said foreclosure judgment absolutely terminated the right to redeem, if a valid sale created something to redeem from. But see *Van Vleck v. Anderson*,

3. MORTGAGES:
foreclosure and
redemption:
appeal from
foreclosure
judgment.

136 Iowa 366; *Guinn v. Elliott*, 123 Iowa 179. Without reference to abatement or adjudication, said appeal, no matter how it was determined, ended the right of redemption. That right is a statute right, and the statute terminates it if appeal be taken. *Dobbins v. Lusch, etc., Co.*, 53 Iowa 304; *Lombard v. Gregory*, 90 Iowa 682.

In any event, if appeal had not terminated the right to redeem, redemption could be made only within one year from the date of the valid sale. Code Section 4045. No re-

demption was made or attempted within that period. If, then, the suit to redeem has any standing, it must be because the sale was invalid; and the appellants so charge.

4. **MORTGAGES:**
foreclosure and
redemption:
presumption of
regularity of
sale.

They allege two irregularities, and thereupon charge that the sale of August 9, 1913, was illegal and void, "and beyond the jurisdiction of the sheriff," because the sheriff made the same subject to a year's redemption. The argument is that, an appeal having been taken, the sale was absolute and without redemption; and that, on absolute sale, a better price would have been obtained. Without conceding that a sale would be void where it should have been absolute, and was, instead, on a year's redemption, we can find no evidence that the sale was with such redemption. In the abstract, the return of the sale is dealt with by the mere statement that the sale was on August 9, 1913, and that the bid was \$3,958.05. The sheriff's deed recites that the sale was made in accord with the order of court, "and in pursuance of the statute in such case made and provided." The deed says nothing on the subject of selling subject to redemption—and this is all the evidence that the sale was on redemption. If appellants are right in saying that the lawful method was a sale absolute, then the presumption in favor of the regularity of official conduct, and the further presumption for the recital that sale was

made in pursuance of the statute, tend to establish, not that the sale was void, but that it was in all respects regular.

But it is further complained that, while selling subject to redemption might not have been harmful ordinarily, it was made harmful because the sheriff, before the year of redemption had expired, executed sheriff's deed; that this formed a cloud on the title, and made it impossible to raise the redemption money out of the land. The fact that the sheriff's deed was executed before the year of redemption gives color to what we have already said about the nature of the sale. It tends to support the theory that the sale was not made subject to redemption; for, if it had been, the deed would not have been issued as soon as it was.

We do not overlook a statement by appellant that "the certificate of foreclosure sale is by its terms subject to a year's redemption," but can find no evidence of it.

Having disposed of whether the premature issue of the deed is evidence that the sale was an absolute one, we have next to consider it on the allegation that the sale was thereby made void. We have held to the contrary,

5. MORTGAGES :
foreclosure and
redemption :
premature issu-
ance of deed. and ruled, in *Olmstead v. Kellogg*, 47 Iowa 460, that the fact that a deed was given immediately after the sale, instead of a certificate of sale, was a mere irregularity, which did not deprive the judgment debtor of the right to redeem, and did not invalidate the sale.

The premature issuance of the deed did not work the fraud alleged, and did not deprive the debtor of any substantial right; for, notwithstanding its prematurity, the title remained in the debtor. Any abstracter who would pass a loan with nothing but the sale and the certificate of redemption extant, would pass the title for the same loan, despite a clearly unauthorized premature deed. See *Conner v. Long*, 63 Iowa 295, and Sections 3101, 3102, of the Code of 1873.

The sale is not void. The former appeal terminated all right to redeem from it. If that were not so, the time to redeem expired on August 9, 1914. No attempt to redeem was made until in 1917. And, as the accounting is solely in aid of the attempted redemption, the venue as to Sloanaker was in Jasper County. Wherefore, we may not reverse because the court declined to compel him to try it in Monroe County.—*Affirmed.*

LADD, C. J., EVANS, and PRESTON, JJ., concur.

S. J. NASH, Appellant, v. AMERICAN INSURANCE COMPANY,
Appellee.

INSURANCE: Action on Policy—Fire Insurance—Cause of Injury.

- 1 Evidence reviewed, in an action on a fire insurance policy for damages to a silo, and held sufficient to go to the jury on the issue as to whether the injury to the silo was caused by fire, and not by the generation or explosion of gas vapor.

INSURANCE: Avoidance or Forfeiture of Policy—Increased Hazard—Fire in Concrete Silo.

- 2 The building of a fire in the center of a silo on a concrete floor did not invalidate a policy of fire insurance having a provision making the policy void "if the hazard be increased by any means within the knowledge of the insured," such provision not having reference to mere temporary acts of negligence, or ordinary acts of ownership.

INSURANCE: Action on Policy—Defenses—Reckless Negligence.

- 3 While mere faults or negligence of the insured, unaffected by any fraud or design, do not constitute a defense to an action on a fire insurance policy, yet this rule will not excuse extreme recklessness and inexcusable negligence on his part, the consequences of which must have been obvious to him at the time

INSURANCE: Action on Policy—Fire Insurance—Reckless Negligence of Insured.

- 4 Evidence reviewed, in an action upon a fire insurance policy for damages to a silo, and held sufficient to go to the jury on the question whether the insured, in building a fire within the silo in the center of the concrete floor, was guilty of such gross recklessness or negligence as that the jury could have found that he acted by design in burning the silo.

Appeal from Warren District Court.—GEORGE B. LYNCH,
Judge.

OCTOBER 25, 1919.

REHEARING DENIED JANUARY 20, 1920.

ACTION for indemnity stipulated in fire insurance policy resulted in a directed verdict for defendant and judgment thereon. The plaintiff appeals.—*Reversed.*

Berry & Watson, for appellant.

F. P. Henderson, for appellee.

LADD, C. J.—I. The policy on which this action was brought covered a silo when it was damaged by fire. The defendant denied liability on these grounds: (1) That plaintiff had increased the hazard, thereby rendering the policy void; (2) that the damages were caused by an explosion of vapor or gas, and not by fire; and (3) that the damages were consequent on the reckless conduct of the plaintiff. The question for consideration is whether any of these defenses were conclusively established.

The silo was 30 feet high, and 18 feet in diameter, resting on a concrete base. It was of frame construction, with one-piece timbers 30 feet long, and a galvanized iron roof, one or two pieces of which were loose. It had been filled with ensilage, the fall before, but the ensilage had been fed out until 10 or 12 feet from the bottom, when it began to freeze. Plaintiff then cut the ensilage from the center to the bottom, leaving that which had been frozen, about two feet in thickness, on the outside. This left an open space in the center, 12 or 14 feet in diameter. He then cut through this to a door, and, in the afternoon of February 1, 1918, with his son, entered through the open door, and started a fire in the center on the concrete floor. After the fire had burned a few minutes, he went for more fuel, and, upon his

return, noticed that the fire had blazed up more than he had anticipated. Fuel was not added, and, after cautioning his son to remove his overcoat, he observed that "there were some of those chunks that were iced when we built the fire," had dried so that he "saw one kind of curl up." For the first time, he then apprehended danger, remarked that it was getting pretty warm, and, as his son was about to enter the silo, to push the fire back and settle it, the fire caught the shucks and silks "hanging around on the ensilage," and "blazed round and round until it got onto this dry material above the ensilage." The witness explained that, when the knives of the ensilage cutter became dull, the shucks will hang on them, and the cutter is stopped, once in a while, to clear the knives of these husks. The ensilage had been frozen several days, and the witness thought the husks may have dried some in the meantime; that the fire burned about 25 minutes; that it flashed up quick, but not like an explosion; that it did not burn as though it might have been vapor or gas. The side boards or timbers of the silo were burned down different distances from the top, the hoops fell off, and, after a few days, it fell.

The recital of the evidence indicates plainly enough that the court might not have found that the injury to the insured property was caused by the generation or explosion of gas vapor. Quite as satisfactory an

1. INSURANCE:
action on policy:
fire insurance:
cause of injury.

explanation is that heating the air within the silo caused a draft upward, from the cold air coming in at the open door, and that the fire first caught the husks and silks, and

was carried up by the draft.

II. The policy provided that it should become void "if the hazard be increased by any means within the knowledge of the insured." The trial court held, and we think rightly,

2. INSURANCE:
avoidance or
forfeiture of
policy: in-
creased hazard:
fire in concrete
silo.

that building the fire in the silo did, in fact, increase the hazard. Was this increase of hazard such as was contemplated by the clause quoted? If so, whatever the insured may have done, though temporary or incidental in its nature, in the use of his property, having that effect, must have rendered the contract invalid. Such is not the necessary construction of the clause quoted. Similar clauses have been held by other courts to have reference to changes in the use, situation, or exposure of the property, permanent in their nature. In *Angier v. Western Assur. Co.*, 10 S. D. 82 (66 Am. St. 685), the stipulation was that "this entire policy shall be void * * * if the hazard be increased by any means within the control or knowledge of the insured," and the court held that the term "'increase of hazard' denotes an alteration or change in the situation or the condition of the property insured which tends to increase the risk. These words imply something of duration, and a casual change of a temporary character would not ordinarily render the policy void." In *First Cong. Church v. Holyoke Mut. F. Ins. Co.*, 158 Mass. 475 (35 Am. St. 508), and *Harris v. Columbiana Ins. Co.*, 4 Ohio St. 285, 286, the rule was announced that a casual or temporary change will not ordinarily be sufficient to void a policy under this provision. See, also, *Williams v. New England F. Ins. Co.*, 31 Me. 219; *Westchester Fire Ins. Co. v. Foster*, 90 Ill. 121. The provision does not prohibit the owner from exercising the usual and ordinary acts of ownership. *Jolly's Admrs. v. Baltimore Eq. Soc.*, 1 Harris & Gill (Md.) 295 (18 Am. Dec. 288); *Peterson v. Mississippi Valley Ins. Co.*, 24 Iowa 494. Nor does it include mere acts of negligence on his part, unless these are so continuous and of such a nature as to increase the hazard more or less permanently. It is to be presumed that the contract was entered into with reference to the character of the property and the owner's use of it,

and it would greatly impair the advantages of insurance, were trivial or temporary variations permitted to defeat the contract. *Siemers v. Meeme Mut. Home Prot. Ins. Co.*, 143 Wis. 114 (139 Am. St. 1083); *Adair v. Southern Mut. Ins. Co.*, 107 Ga. 297 (73 Am. St. 122, 45 L. R. A. 204); *First Cong. Church v. Holyoke Mut. F. Ins. Co.*, 158 Mass. 475 (19 L. R. A. 587); 14 R. C. L. 1145, Sec. 327. *Davis v. Western Home Ins. Co.*, 81 Iowa 496, seems opposed to this doctrine. The policy there construed provided that it should be void "if there be any change in the exposure by the erection or occupation of adjacent buildings, or by any means whatever in the control or knowledge of the assured." A corn sheller, propelled by an engine and boiler, was placed quite near two corncribs, and fire, originating from the engine, burned one of them; and the court held, reversing the trial court, that this was within the clause quoted, and rendered the policy void. No attention appears to have been given to the thought that the clause had reference to changes more or less permanent in their nature, and not to those merely incident to the ordinary use of the property; nor are authorities elsewhere referred to. The decision is contrary to the great weight of authority, and, as we think, was overruled in *Des Moines Ice Co. v. Niagara Fire Ins. Co.*, 99 Iowa 193, 200. There, the president of the company which owned the property started a fire in or near one of the buildings, for the purpose of burning some rubbish or debris, and the fire spread and burned the insured building. The insurer urged that this was an increase of the risk or hazard, and rendered the policy void, under the stipulation "if the hazard be increased by any means within the control or knowledge of the assured." The court ruled otherwise, alluding to the well-settled rule that the mere negligence of the assured afforded no defense to an action on an insurance policy, and pointed out that, in *Davis v. Western Home Ins. Co.*, *supra*, there "was the setting-up of a business in

dangerous proximity to the insured property. It does not appear how long the operation of the engine was carried on before the property was destroyed." This distinction was thought sufficient; but we are not ready to say that the temporary use of a cornsheller, operated by an engine to shell his corn (in that case, 1,900 bushels in ear), located so as to accomplish that object, is such a permanent increase of hazard as was contemplated in the clause quoted. On the contrary, it was what might well have been anticipated would happen in the course of the owner's work about the corncribs, and should have been regarded as temporary, and incidental to the use of the cribs. In principle, we regard the cases as identical, and are content in ruling that *Davis v. Western Home Ins. Co.*, supra, is overruled by the later case. The case at bar is ruled by *Des Moines Ice Co. v. Niagara Fire Ins. Co.*, supra, which is in harmony with the decisions from other states heretofore cited. Setting the fire was not in violation of the clause contained in the policy.

III. The defense that lighting the fire in the silo was so reckless and so grossly negligent that this might have been done by design, was not conclusively established by the evidence. The rule that mere faults or

3. INSURANCE:
action on policy:
defenses:
reckless negligence.

negligence of the insured, unaffected by any fraud or design, do not constitute a defense to an action, or an insurance policy, is well settled. *Des Moines Ice Co. v. Niagara Fire Ins. Co.*, supra. But, as said in *Mickey v. Burlington Ins. Co.*, 35 Iowa 174:

"This rule will not excuse extreme, reckless, and inexcusable negligence on the part of the assured, the consequence of which must have been palpably obvious to him at the time. * * * The gross degree of negligence, and its inexcusable character, coupled with the knowledge of its certain effects, ought, it would seem to us, to raise a presumption that the party intended the obvious and necessary con-

sequences of his action, which, at the time, were apparent to him."

It cannot be said, as matter of law, that the plaintiff was guilty of such gross negligence or recklessness as that the jury could only have found that he acted by design in burning the silo. His testimony that he did not appreciate the danger is not disputed, and the circumstances were not such as to necessarily compel a different conclusion. The court erred in directing a verdict for the defendant and in entering judgment thereon.—*Reversed.*

4. INSURANCE:
action on policy:
fire insurance:
reckless
negligence of
insured.

EVANS, PRESTON, and SALINGER, J.J., concur.

JOHN PALUMBO, Appellee, v. W. D. JENKINS LUMBER COMPANY, Appellant.

APPEAL AND ERROR: Reversal—Damages for Delay. In an *independent* action by a judgment defendant to set aside the judgment, successful in the trial court but *reversed* on appeal, the trial court may not, after such reversal, enter, by way of damages because of delay, a judgment against the unsuccessful plaintiff, based upon a percentage of the judgment in the other case. (Sec. 4099, Code, 1897.)

APPEAL AND ERROR: Reversal—Penalty—Damages—Discretion.
2 Damages for delay in prosecuting an unsuccessful appeal may be wholly refused by the court on remand.

Appeal from Linn District Court.—F. F. DAWLEY, Judge.

JANUARY 20, 1920.

THIS is a proceeding under Section 4099 of the Code for additional judgment for damages resulting from the delay in proceedings by reason of the vacation of a judgment. The trial court found for Palumbo, and declined to

assess against him the penalty or additional judgment asked by the lumber company. The lumber company appeals.—*Affirmed.*

L. M. Kratz, for appellant.

Crissman & Linville, for appellee.

PRESTON, J.—The record in this case is short, but it is somewhat mixed, though counsel for appellant says in argument that the facts showing that it is entitled to the additional judgment are lucidly apparent from the record. According to the abstract, Palumbo is the plaintiff and appellant, and Mr. Kratz is his attorney; and the lumber company is the appellee, and Crissman & Linville are its attorneys. It seems that the original case was entitled *W. D. Jenkins Lumber Co., v. Cramer et al.* Palumbo was one of the defendants therein. Palumbo filed a petition in equity to vacate said judgment, and, as we understand it, this was by a separate action, wherein Palumbo denominated himself plaintiff. The original case seems to have been numbered 23433, and the other, 24013. On this appeal, the lumber company is referred to as the appellant in some places and as appellee in others, and as plaintiff in some places, and as defendant in others; and that is true as to Palumbo. Palumbo was the plaintiff in the petition to set aside the decree, and was appellee in the first appeal to this court. These matters, with the wrong designation of the parties appellant and appellee on this appeal, doubtless cause the confusion. We assume from the entire record that the lumber company is the appellant, and is asking the penalty or additional judgment against Palumbo. The entire record and the notice of appeal so show.

It appears that, on October 22, 1914, a judgment by default was entered in favor of W. D. Jenkins Lumber Com-

pany against Palumbo, establishing a mechanics' lien and foreclosing the same against the property of said Palumbo, for \$666.50. On December 15, 1914, Palumbo filed in the district court his petition in equity to vacate and set aside said judgment and the decree, which application was sustained, and the judgment and decree against Palumbo set aside. From such ruling the lumber company appealed to the Supreme Court, and the judgment of the district court was reversed, November 17, 1916. *W. D. Jenkins Lumber Co. v. Cramer Bros.*, 182 Iowa 161. On January 29, 1918, on application of the lumber company, the district court made the following order:

"January 29th. In accordance with procedendo from the Supreme Court, the plaintiff's petition to vacate judgment is dismissed on the merits at plaintiff's costs, and judgment accordingly. Pursuant to Section 4099 of the Code, additional judgment is rendered in favor of defendant, and against John Palumbo, plaintiff, for \$66.65, being ten per cent damages on amount of original judgment affirmed."

February 1, 1918, Palumbo filed a motion to set aside the judgment of \$66.65, above referred to. The motion was entitled John Palumbo, plaintiff, v. W. D. Jenkins Lumber Co., defendant, cause No. 24013, and says:

"Now comes plaintiff in the above-entitled action, and moves that the order and judgment made and entered in the above-entitled action in the sum of \$66.65, or 10 per cent of the judgment rendered in cause No. 24013, be vacated and set aside."

The grounds of the motion were:

"That no judgment for \$666.50, on which to base an additional judgment of ten per cent, was ever rendered in case No. 24013; that the only judgment rendered or that could be rendered in said case was for costs on dismissal after reversal, and Section 4099 of the Code has no application; that no motion was ever made for judgment, and no

notice thereof was served on the plaintiff; that the court did not have full knowledge of the facts; that the judgment for \$66.65 is inequitable, unconscionable, and oppressive; that there was never any affirmance of the judgment rendered in said cause."

On February 4, 1918, said motion was sustained, and the judgment of January 29th for \$66.65 was set aside. Thereafter, the lumber company renewed the motion for damages, under the section of the statute before cited. Appellant's contention is that the collection of its judgment in the original case was delayed about three years by the wrongful setting aside of the original judgment against Palumbo. It asked that the penalty or additional judgment be entered against Palumbo in the case wherein Palumbo was plaintiff in the application to set aside the original judgment and decree, using the judgment in the other case as a basis for computing the amount. The only relief asked in the action to set aside was that the judgment and decree be vacated. The trial court sustained that application, but it was reversed by the Supreme Court; and we think the only entry that could be made in that case would be to dismiss Palumbo's petition to vacate, and this was done. The decree vacating the original judgment was reversed in the Supreme Court, and not affirmed. The statute provides for assessing additional judgment when the appeal is affirmed. We think appellant's contention that the action was wrongful, in the sense that a penalty should be imposed therefor, cannot be sustained. Palumbo had a right to make an application to vacate and set aside the original judgment and decree. The error was that of the trial court, as it turned out afterwards on appeal. No bad faith is shown on the part of Palumbo in that application. When the vacating order was reversed, that left the appellant's judgment standing against Palumbo, and it

1. APPEAL AND
ERROR: reversal: damages
for delay.

would draw interest from the time it was originally entered; and this would cover, of course, the three years' delay complained of. Ordinarily, this is sufficient compensation for any delay occasioned by the vacating order, in the absence of bad faith. Perhaps a case might arise where an injunction had been granted, restraining the collection of a judgment or the like, which might justify assessing of penalty or additional judgment. But we have

2. APPEAL AND
ERROR: rever-
sal: penalty:
damages: dis-
cretion.

no such question here. It is further contended by appellant that the discretion of the trial court, referred to in Section 4099, applies only to the amount; that the statute is mandatory that an additional judgment must be entered in some amount. We are of opinion that there is a discretion in the trial court whether to assess any penalty. The trial judge is on the ground, and can ordinarily understand the situation and determine whether any penalty should be assessed. We think appellant was not entitled to any additional judgment in the case that was reversed, nor in the original case, for that matter, and the trial court properly set aside the said additional judgment of \$66.65, and properly declined to enter a judgment therefor on appellant's application thereafter to do so.

Under Section 243 of the Code, the court had authority to set aside the judgment of \$66.65, at the same term when attention was called to the fact that it had been improperly and erroneously entered. The action of the district court is—*Affirmed*.

WEAVER, C. J., EVANS and SALINGER, JJ., concur.

MARGARET ROENNAU, Appellee, v. DANIEL WHITSON, Appellant.

HIGHWAYS: Equality of Right—Vehicles and Coasters. The driver of an ordinary carriage drawn by horses, and a party of coasters with sleds, may lawfully make joint use of a highway for purposes of pleasure, and neither possesses any superiority of right over the other. Use of a country road for coasting purposes does not constitute a public nuisance.

NEGLIGENCE: Failure to Maintain Lookout on Public Road. One traveling on a public highway must maintain a reasonable lookout for others lawfully thereon. Evidence reviewed, and held to present a jury question on the issue of a driver's negligence, resulting in injury to a party of coasters.

NEGLIGENCE: Imputed Negligence—Common Enterprise—Coasting Party. Principle recognized that the mere showing that several parties were engaged in a common enterprise is not sufficient to charge one with the negligence of another, but that it must further appear that the injured person had the right, or assumed the right, to control the conduct of the negligent person.

NEGLIGENCE: Contributory Negligence—Coasting Party. Evidence reviewed, and held insufficient to show contributory negligence *per se* on the part of young people using a country road for coasting purposes.

HIGHWAYS: Coasting as Criminal Offense. Coasting on the public highway in the ordinary way does not constitute the offense of "racing," within the meaning of Sec. 5039, Code, 1897.

HIGHWAYS: Law of Road—Applicability. The "law of the road"—the law which requires persons in vehicles meeting on the public road to turn to the right—is applicable to the driver of a horse-drawn vehicle who meets coasters on the public road. (Sec. 1569, Code Supp., 1913.)

NEGLIGENCE: Evidence—Sufficiency. One may not say that he was under no obligation to exercise an act of care toward another because he did not *know* of the presence of such other, when the facts and circumstances would justify a finding that, in the exercise of reasonable care, he *would have known* of such presence.

NEGLIGENCE: Last Clear Chance—When Doctrine Applicable.

- 8 The "last clear chance" doctrine is applicable whenever two parties are concurrently negligent, but one of the parties discovers the negligence of the other in such time that, by the exercise of reasonable care, he might have avoided the injury, and does not do so.

HIGHWAYS: Nuisance Resulting from Reckless Use. Principle rec-

- 9 ognized that the use of *any* vehicle upon a public highway may be of such nature as to constitute a nuisance.

Appeal from Pottawattamie District Court.—EARL PETERS, Judge.

JANUARY 20, 1920.

ACTION at law to recover damages for personal injury. Verdict and judgment for plaintiff, and the defendant appeals.—*Affirmed.*

Tinley, Mitchell, Pryor & Ross, for appellant.

W. H. Killpack and F. E. Northrop, for appellee.

WEAVER, C. J.—The plaintiff was injured in a collision upon a public road between a coasting sled on which she was riding and a carriage driven by the defendant. The highway at the point in question extends

1. HIGHWAYS:
equality of
right: vehi-
cles and
coasters.

east and west, and the hill over which it is laid has its ascending slope to the east.

At this point, the roadway is narrowed somewhat by a bank or cut on the north, but, as we understand the record, the improved portion of the road is wide enough to readily permit the passage of teams and vehicles meeting there. The hill or slope is quite long, but the coasters do not appear to have been utilizing its entire length. There was a considerable body of snow on the ground, the traveled track had become quite icy, and the descending sleds acquired a high rate of speed. The collision took place in the evening, under circumstances substantially

as follows: The coasting party was made up of seven or eight young people, who were making use of one or more small sleds, carrying but one or two riders each, and a so-called "traveler," which consisted of two narrow sleds, coupled tandem fashion, with a plank or board laid lengthwise over them. This vehicle would carry four or more riders. The appellant lived several miles from the place of the accident. He had been over this road a few times, but not in the winter season. On the evening in question, with a covered buggy and team of two horses, he had driven to the house of a neighbor, where his companion, a young woman, joined him for a ride. In the course of their drive, they reached the east and west road first mentioned, some distance west of the foot of the hill, and there turned eastward. It so happened that, about this time, two young men of the coasting party, with plaintiff and another young woman, took the traveler, and went east to the top of the first hill, for the purpose of making a trip down the western slope. They left three younger members of the party at the foot of the hill, with instructions to warn anyone who might chance to be traveling the road eastward; and thus avoid possible collision. The party with the traveler appears to have reached the top, or near the top, of the hill before the defendant and his companion, approaching from the west, were seen or heard by the watchers at the foot. When they were discovered, one of the three watchers ran eastward, shouting to the coasters, thinking he could stop them before they started down; but he was too late, and the party was on its way before the riders could receive the warning. At about the same time, defendant reached the place where the other watchers, a boy and girl, were stationed at the foot of the hill. Both these youngsters testify that each called out to the defendant that a sled was coming down the hill, but he did not heed them, and went on. Defendant and the young woman with him both say they

heard the boy and girl call out something, but they did not understand what was said.

It should also be said, with reference to the coasters, that they were loaded on the long and narrow traveler, one young man lying on his face, and managing the steering with his hands, and the other young man either lay or sat on the first, carrying an electric flashlight, pointing forward, while the two young women sat farther to the rear. The meeting took place at a distance not clearly shown to the east of the point where defendant passed the boy and girl. He does not seem to have realized the peril of the situation, until the coasting party was almost upon him. He then reined his team, or the team in its fright swerved of its own motion, to the right; and, as it turned, the "traveler," with its load of coasters, came in contact with a wheel of the carriage. The collision was not fully "head on," but its force was sufficient to break a spoke in the wheel of defendant's carriage and one of the runners on the coasting sled, which was upset, with its load. The defendant paused long enough to check his frightened team, and, after looking back at the coasters, drove on. In this collision, the plaintiff sustained very severe bruises of her person generally, and a comminuted fracture of her left upper arm, near the shoulder. Her injuries were followed by blood poisoning, necessitating somewhat protracted hospital treatment, as well as care, treatment, and nursing in her own home, and a resultant expenditure of considerable labor and expense.

A medical expert, testifying from an examination made at the time of the trial below, says that plaintiff's injuries have left her with only a limited use of her arm. He says the arm is "not nearly as good, and never will be as good as formerly; the deformity is great, and the motion very limited."

The negligence charged against defendant is his alleged

carelessness or recklessness in driving on up the hill, after having been warned of the situation by the watchers at the foot of the hill; also by the flashlight carried by the coasters, and the further warning given by their outcries as they started down the slope. Negligence is also charged in defendant's alleged failure to turn to the right sufficiently to allow the coasters to pass in safety. That the boy and girl at the foot of the hill did call out warnings to the defendant is not seriously questioned, but it is claimed for defendant that they were not given in a manner enabling him or his companion to understand their meaning, and that he could not and did not comprehend therefrom that a sled was descending the hill. He admits that, as he proceeded, and before reaching the place of collision, he saw the light. He says, however, that he did not at first realize that the light was moving, and that, as soon as he did discover it to be in motion, he at once sought to turn out of the track; but, before he had fully accomplished his purpose, the "traveler" went quickly by. The persons standing at the foot of the hill say that the light on the traveler was visible from the point of its starting, all the way down, and that the shouts of the riders were continuous and audible. Those on the traveler unite in saying that they shouted an alarm to "clear the way," or words to that effect, from the time their descent began, and that the light was pointed forward, though, as we infer, with a downward slant, to illuminate the path for the benefit of the steerer. The traveler was a narrow contrivance, the sleds and the connecting plank being only about 12 or 15 inches, at most, in width. The trodden or icy path in the road had been broken and worn to some extent by auto cars, and the riders on this last unfortunate trip say that the traveler was kept with its right runner in the right-hand auto track, as they went down the hill.

While the foregoing is not a full statement of the testi-

mony, we have mentioned enough to illustrate the tendency and general effect of the showing made by the contending parties. At the close of the evidence in chief for the plaintiff, defendant moved for a directed verdict in his favor, on grounds the substance of which is:

(1) That there was no evidence to support a finding of negligence on part of the defendant; and

(2) That plaintiff shows herself chargeable with contributory negligence, as a matter of law.

The motion having been denied, the defendant introduced his evidence, and thereafter renewed his motion for a directed verdict. This also was denied. The jury returned a verdict for plaintiff for \$2,286. Defendant appeals.

I. Appellant's principal reliance for a reversal of the judgment below is upon the two propositions assigned by him for a directed verdict: the insufficiency of the evidence to support a finding of negligence on his part, and the conclusiveness of the showing of plaintiff's own negligence.

While not in terms denying the lawfulness of the use of a country highway for coasting purposes under ordinary circumstances, appellant's argument, in many of its assumptions and inferences, seems grounded on the thought that, as between the defendant, driving an ordinary wheeled carriage, drawn by horses, and the party of coasters, moving over the same public road on a sled propelled by their own weight, the superiority of right is with the former. "Surely," say counsel, "the defendant had a right to drive up the hill in the beaten or traveled way upon this public road." This may be conceded; but it by no means answers or avoids the plaintiff's complaint if, as a matter of law, she was also clothed with a like right to come down the hill "in the beaten or traveled way." The right which any person has to use the public road in going from place to place is a right which he holds in common, as one of the public. Each and

every person exercising a common or public right is bound to do so with reasonable regard to the safety of others lawfully claiming a like privilege. So far as the highway is concerned, the law recognizes no favorites in its use. The titled traveler, with his "coach and six" and outriders, has no higher or better right in the public road than has the patient squaw, with her pony, dragging the primitive travois which bears her load of blankets. And, barring only the reservation that the vehicle shall not be a kind destructive of the public use of the road, or otherwise constituting a nuisance, the law, in the absence of statute at least, does not close the road against any form or method of travel or transportation known to man. Nor does the law limit such public right to the use of the highway as a mere artery or conduit of business or commerce. More and more, as the years go by, are the public ways crowded with those who walk or ride or drive for the mere pleasure of it, or as a restful change from their labors, or as a matter of exercise, taken for the promotion of health. No practicable motive power has yet been developed which is, in itself, unlawful for use upon the highway. The subjection of steam, gas, and electricity to such uses is already an accomplished fact. Nor is gravity, that most universal and potent of all nature's forces, overlooked. The bicycle rider coasts down the hills, and the automobile driver does the same, and utilizes the momentum thus acquired to carry him far up the opposite slope; and in so doing, neither of them abuses his lawful right to the use of the road.

Nor is the right lost or forfeited because the use being made of the road is merely one of the movements in some amusement or sport. If, for example, a company of boys, playing "fox and hounds," lay out a course which takes pursuer and pursued along the traveled road, they are no less entitled to the rights, privileges, and protections which pertain to the public use of such road than would be theirs

if they were soberly making their way to school, or to a funeral. Speaking to this point, the Wisconsin court has said:

"It would seem to be reasonable that, if the person injured, whether an infant or an adult, was, in a proper sense, traveling on the sidewalk, it should not be an objection to his recovery that, at the same time, he was indulging in play or pastime not inconsistent with his being a traveler, also. A person traveling from place to place on a sidewalk is a traveler thereon. He is going somewhere. It makes no difference whether it is for business or for pleasure, or merely to gratify an idle curiosity." *Reed v. City of Madison*, 83 Wis. 171.

See, also, *Beaudin v. Bay City*, 136 Mich. 333 (99 N. W. 285); *Hutchinson v. Town of Concord*, 41 Vt. 271; *Faulkner v. City of Aurora*, 85 Ind. 130; *Lynch v. Public Service Corp.*, 82 N. J. L. 712 (83 Atl. 382); *Burford v. City of Grand Rapids*, 53 Mich. 98; *Jackson v. Castle*, 80 Me. 119.

Proceeding, then, on the theory that plaintiff and defendant were both lawfully in the road, the question of defendant's liability or nonliability for the injury to plaintiff becomes one for the application of the well-

2. NEGLIGENCE:
failure to maintain outlook on public road.

settled principles of the law of negligence. While it was defendant's right to travel the road along its beaten track, he must be held to have known the equal right of others to also use the same path in either direction, and was, therefore, charged with the duty of maintaining a reasonable outlook upon the way before him, to ascertain the approach of other travelers and, by a seasonable turn to the right, avoid any collision, the danger of which he saw, or, by the exercise of reasonable care, ought to have seen. True, a conclusion of negligence by either party would not necessarily or properly follow from the mere fact that the vehicles came into collision in

the darkness of night, there being no evidence of facts or circumstances from which the jury could find that reasonable care on the part of either would have prevented the accident. But the record is not void of significant attendant circumstances and pertinent evidence to sustain a jury finding that defendant was negligent in this respect.

Giving the testimony its most favorable construction in support of the verdict returned, it was shown that defendant was warned of the danger while still at the foot of the hill; he saw the flashlight at a distance which, he concedes, may have been 200 feet, and other evidence tends to show it was plainly visible all the way down to the point where the watchers were stationed; the coasters were making loud outcries for a clear way, from the instant of their start down the slope, cries which were audible at the foot of the hill; and the darkness itself was a patent fact, calling for caution on his part; and this is especially true if, as he says, he was driving a fractious or "outlaw" team of horses, liable to make trouble when frightened. Nevertheless, he drove steadily ahead, occupying nearly, if not all, the traveled track, up to nearly or quite the instant of collision. It is argued by counsel that he did yield the road, in part at least; but the jury could well have found otherwise.

The coasting sled, as we have seen, was a narrow contrivance, not more than 12 to 15 inches wide, and some 8 feet in length. On this vehicle, the two young men were lying at length, one over the other; while one of the young women sat farther back, with her feet on the plank, and holding up the feet of her companion, who sat behind her. They descended the hill with the right sled runner in the north or right-hand auto track. Thus it will be seen, if the testimony be true, that this narrow vehicle and its load of riders were, at every point of its descent, well within the north half of the beaten track; and, had the defendant

yielded one half of the track, there would have been no collision. That, under such corroboration of circumstances, the jury could properly find the defendant negligent is too clear for debate.

The remaining inquiry is whether the jury should have found the plaintiff guilty of contributory negligence, and therefore not entitled to damages. In the discussion of

3. NEGLIGENCE :
imputed negli-
gence : common
enterprise :
coasting.

this proposition, appellant has argued that the members of the coasting party were engaged in a joint enterprise, and that the negligence of each is imputable to all. We

hardly think that the facts shown justify an application of this rule. Plaintiff is not shown to have owned or had any possession or control of the coaster, or its use or management. She had not before taken any ride upon it, and the fair inference to be drawn from the situation is that she was taking this ride at the invitation of the young men who had the vehicle in charge. But, even

4. NEGLIGENCE :
contributory
negligence :
coasting party.

if the rule contended for were to be applied, we think there was no such absence of care shown on part of any person connected with

the party as to make the question of contributory negligence one of law. They did, at least, show some appreciation of their duty in the premises by stationing watchers at the foot of the hill, to give warning to any traveler chancing to approach from the west, and by displaying a light, visible the whole length of their course, and by shouts audible, apparently, to any traveler within the zone of danger; and this, to say the least, entitled plaintiff to go to the jury upon the question whether she, by her own fault, contributed to the injury of which she complains.

This case, in many of its essential features, has a close counterpart in *Lynch v. Public Service Corp.*, 82 N. J. L. 712 (83 Atl. 382). The facts in that case are, to an extent, quite parallel with those of the case at bar, except that the acci-

dent there considered took place upon the street of a large city, instead of a country road, and the vehicle with which the sled collided was a street car, instead of an ordinary carriage,—a difference tending very strongly in favor of the street car company, which was, nevertheless, held liable in damages. The circumstances, stated more in detail, were as follows:

Mountclair Avenue in the city of Newark runs east and west, and is crossed at the foot of a hill by Prospect Avenue, on which a street railway is operated. The hill on Mountclair Avenue affords a coasting place, on which young people gathered for the sport. As in the instant case, some made use of small sleds, while others united in using a long coaster. The momentum acquired in the descent was sufficient to carry the sleds to and across the street car track on Prospect, and, to avoid collision there, some of the boys would ordinarily be standing near the crossing, and give signals of some kind. On the occasion in question, a young man stood at the corner, and signaled the sleds to come down. After this was done, he discovered a car approaching, and signaled it to stop. His signal was not acted upon, and a collision occurred between the car and the large coaster, injuring the plaintiff, a girl of 13 years. On trial of an action brought against the car company for damages, the trial court held that no cause of action had been shown, and defeated the plaintiff. The theory of the trial court in so ruling was very like that of the appellant in this case, and, while not holding that coasting on a public street is, at all times and under all circumstances, a nuisance, it yet ruled that to indulge in such coasting without any brake or other device to stop the sled if occasion requires, is a nuisance, and that one indulging in such sport on the street is not in the rightful use of the public way. On appeal, that judgment was reversed, the court saying, among other things:

"We think the view taken of the case by the trial court was erroneous. The granting of the nonsuit at the close of the plaintiff's case could be justified only upon the ground that the act of the plaintiff was a public nuisance,—in fact, a nuisance *per se*, the existence or nonexistence of which is admittedly a question of law, purely. If the act was not a public nuisance, then whether or not the particular thing, act, omission, or use of property complained of was, in fact, a nuisance was to be determined by the jury. 21 Am. & Eng. Encyc. p. 621."

We cannot concede that coasting upon a public street is an illegal act, so as to constitute it a public nuisance. Public highways are intended for pleasure uses, as well as business uses; and it is difficult to see why a sled, coasting downhill, should be said to be a public nuisance, any more than a sleigh, drawn by horses, going down the same highway.

The matter of the coasting or sled riding in a public street has been a subject of decision in several jurisdictions; and we agree with the contention of the plaintiff in error that the most logical opinion upon the subject is that of Justice Cooley in the case of *Burford v. City of Grand Rapids*, 53 Mich. 98 (18 N. W. 571, 51 Am. Rep. 105), where he held that:

"Coasting does not necessarily interfere with the customary use of the street, and might be indulged in with no serious inconvenience to anyone, not only in many places in the country towns, but even within the limits of incorporated cities and villages. We are accustomed to make our public ways four rods in width, but it is not expected that the whole four rods will be occupied for travel; and it is possible to make use of parts of the public highway without encroaching at all upon the portions kept in repair and used for passage. * * * It could not be seriously contended that for the municipal authorities to permit coasting

upon such a street would be to license a public nuisance. On the contrary, as the sport is healthful and exhilarating, it seems sufficiently proper, if the street is not put to other public use, that this diversion be allowed, if not expressly sanctioned. The sport itself is not entirely foreign to the purposes for which public ways are established; for the use of these ways for pleasure riding is perfectly legitimate, and coasting is only pleasure riding in a series of short trips, repeated over the same road, not differing essentially from the riding in sleighs, of which so much is seen on the streets of northern cities, when suitable weather and proper conditions invite to their enjoyment."

There are other authorities on the question discussed, but further citations do not seem necessary. After considerable research, we find none out of harmony with those already mentioned, unless it be *McCarthy v. City of Portland*, 67 Me. 167, where the court, in deciding that a person racing horses on a city street has no right of action against the city for damages if his horse is injured by a defect in the street, goes far enough afield to suggest, by way of illustration, that a boy dragging his sled to school may lawfully mount it, and ride so far as a friendly hill in the road may carry him on his way to the schoolhouse; yet, if he so far forgets the strict rules of Puritan propriety as to stop at the foot of the hill and trudge back again to the top for another slide, for the pure fun of the thing, he becomes an outlaw or trespasser in the highway, bereft of the privileges and protections of an ordinary traveler.

The holding was bald dictum; and, so far as we have discovered, has never been followed elsewhere. Indeed, that court itself seems very soon to have ignored the precedent, by holding, in *Jackson v. Castle*, 80 Me. 119 (13 Atl. 49), that coasting in a public street even when "accompanied by boisterous conduct, is not necessarily unlawful."

II. That the use of a public road for such sport may be

a proper subject for legislative or police regulation need not be denied; but, as has been said by the Illinois court, the right to regulate necessarily assumes the lawfulness of that which is to be regulated.

5. HIGHWAYS:
coasting as
criminal offense. *City of Chicago v. Keefe*, 114 Ill. 222. Coun-

sel have called our attention to Code Section 5039, which forbids racing upon the public highway, and makes it a misdemeanor to drive upon a highway in a manner likely to endanger the persons or lives of others. We are unable, however, to discover any application of this statute to the case before us. Under no fair construction of the language can the plaintiff be said to have been racing on the highway. And if we confine our attention to the last clause of the statute, imposing a penalty upon driving "in such manner as to endanger the persons or lives of others," we still find nothing to aid us at this juncture. It fixes no specific limit to the speed at which one may ride or drive. It becomes legally wrong only when indulged in at a time or place or in a manner which, under all the attendant circumstances, makes it a menace to the safety of others. The record in this case presents no facts on which to predicate a finding of that nature.

III. Counsel argue that the statute, Code Section 1569, prescribing the so-called law of the road, which makes it the duty of persons on horseback or vehicles meeting upon

the highway to give one half the road by seasonably turning to the right, can have no application to a meeting on the road between the rider of a sled or coaster

and a person who is operating a vehicle of any other description. We see no valid ground on which to draw this distinction, or to justify us in judicially engrafting upon the statute an exception which the legislature did not make. The statute makes no attempt to classify vehicles, or to include within its terms one or more to the exclusion of oth-

6. HIGHWAYS:
law of road:
applicability.

ers. We have held that a bicycle is to be considered a vehicle, and its rider entitled to the benefit of the law of the road (*Cook v. Fogarty*, 103 Iowa 500, 504); and, if we once concede that any particular vehicle may be lawfully used on a public road, its inclusion within the effect of the "law of the road" is clearly inevitable. It is quite possible that this may, at times, work an apparent hardship, as between a comparatively slow-moving vehicle and one which moves more swiftly or more silently, but such inconveniences or disadvantages are inevitable, unless we destroy the equality of right which makes the highway about the only place left where every man, no matter how humble, is the peer of every other man, no matter how exalted. The universality of this right and use makes it incumbent on each person to exercise it with a reasonable degree of vigilance to avoid interference with others. This duty observed, collisions and accidents will be few, even though annoyances multiply with the multiplication of methods of transportation and locomotion.

The objection appellant makes to an application of the statutory law of the road in favor of a coaster descending a hill, and meeting an ordinary vehicle ascending, was considered by the Minnesota court in the recent case of *Terrill v. Virginia Brewing Co.*, 130 Minn. 46 (153 N. W. 136), and held not to be well taken. It was also there held not to be contributory negligence, as a matter of law, for coasters to descend a hill in a manner altogether similar to that which was adopted by the young people in the case at bar.

Counsel say that the failure of the defendant to turn to the right was not the proximate cause of the collision, and that, unless there is something in the record to show that he heard and heeded and understood the call made to him at the bottom of the hill, there is nothing to show that he knew that plaintiff and her associates were coming down

7. NEGLIGENCE:
evidence:
sufficiency.

the hill. This is a requirement which the law does not impose on the plaintiff. She is not bound to show affirmatively that "he heard and heeded and understood" the warning. Practically no charge of negligence could ever be established under such rule, for the defendant would only have to say. "I did not hear. I did not understand. I did not heed. I did not know," to be immune from liability. To sustain a finding of negligence, plaintiff need go no further than to show facts from which the jury may find that, notwithstanding his denials, the defendant did hear and understand, or that, as a reasonably prudent and intelligent person, he ought to have known and recognized the danger and avoided it. If the jury believed the plaintiff and her witnesses, such a finding was quite inevitable.

In our judgment, the trial court did not err in refusing to rule, as a matter of law, that plaintiff had failed to make a case for the jury on the question of defendant's negligence, or in refusing to hold, as a matter of law, that she was guilty of contributory negligence.

IV. The trial court instructed the jury upon the rule of the last clear chance, and appellant assigns error thereon.

8. NEGLIGENCE:
last clear
chance: when
doctrine ap-
plicable.

The evidence appears to us to warrant the instruction. If, for the sake of the argument, it be assumed that plaintiff was negligent, or that the jury could have found her negligent in attempting the ride down the hill, it was also within the province of the jury, under the evidence, to find that defendant, before proceeding up the hill, was warned that the sled was coming, and could see the light carried by the coasters, and hear their shouts as they came, giving him ample time to swing out of the road, or at least to yield the half of the beaten path, thereby giving the coaster, following the north auto wheel track, room to pass in safety,—all of which could have been found from the testimony. It is difficult to conceive a more typical case

calling for consideration of the "last clear chance." To permit such safe passage, defendant was not required to abandon the beaten path for even a slight turn to the right: sufficient to bring the left wheels of his carriage to or slightly past the median line of the path would have met all requirements, and the accident would not have occurred. The assumption of fact by counsel that neither party discovered the other until it was too late to avoid the collision, and that, therefore, the doctrine of the last clear chance is inapplicable, is not borne out by the record. It may be true that defendant did not fully awake to a realization of the peril until too late; but, if he received timely warning from the watchers at the foot of the hill, or saw or heard that which ought to have led him, as a man of ordinary prudence, to turn aside sufficiently to prevent a collision, and did not do so, he was negligent; and it is no defense to plaintiff's claim to say that she was originally negligent in attempting the ride.

Counsel question the decision found in *Bruggeman v. Illinois Cent. R. Co.*, 147 Iowa 187, as lacking clearness in statement of the doctrine of the last clear chance and the principle upon which it is founded. We think it unnecessary to re-enter that field at this time. The opinion in the cited case was prepared with much care by the late Mr. Justice Deemer, after this question had been argued and re-argued by eminent counsel. We are satisfied that it is not open to the criticism now made upon it. Its language is unambiguous, and the principle there approved has since been repeatedly re-affirmed. The latest case re-announcing the rule is *James v. Iowa Cent. R. Co.*, 183 Iowa 231, which goes to the full extent of the holding in the *Bruggeman* case. No good reason is suggested for discrediting these authorities.

Much of appellant's argument is directed to matters of testimony and conclusions and inferences drawn therefrom; but, in view of our finding that a case was made for the jury,

9. HIGHWAYS:
nuisance re-
sulting from
reckless use.

we think it unnecessary to prolong this opinion for their consideration. In view of some features of the arguments of counsel, it ought to be said that nothing in this opinion is to be construed as denying appellant's proposition that the use upon the public way of any kind of vehicle may be so abused by the reckless and careless conduct of the driver as to create a nuisance, and that, for such act, the plea of public or common right of travel will afford no defense. But the question whether the evidence develops any such wrong is, under all ordinary circumstances, one of fact for the jury alone. We are quite certain, however, that, upon the record before us, it may not be said that any such abuse of the privileges of the highway has been shown, as a matter of law.

We find no prejudicial error, and the judgment of the trial court is—*Affirmed*.

LADD, GAYNOR, and STEVENS, JJ., concur.

J. E. SCOTT, Appellee, v. BARNEY HABINCK et al., Appellants.

SPECIFIC PERFORMANCE: Contracts Enforcible—Sufficiency of

- 1 Evidence. Evidence reviewed, in an action for specific performance of a contract to sell land, and held sufficient to establish the same.

SPECIFIC PERFORMANCE: . Contracts Enforcible—Inadequate

- 2 Consideration. Inadequacy of consideration is, in itself, an insufficient ground for refusing specific performance of a contract, unless so gross as to shock the conscience.

CONTRACTS: Performance or Breach—Agent as Purchaser. Where

- 3 the owner of a farm knew that his agent was one of the purchasers, and did not repudiate, but acquiesced in and consented to the transaction, and accepted the first payment of the purchase money, and after that, rights of other parties intervened, he cannot refuse to perform on the ground of his agent's participation.

SPECIFIC PERFORMANCE: Contracts Enforcible—Fraud in Ob-
 4 **taining Wife's Signature.** Where the wife's signature to the contract for the sale of land was only necessary in order that her husband might be held to specific performance, and that she might be forced to join if she refused, she having no interest except her dower right, and not furnishing title to land, the fact that her signature was obtained by fraud was no defense by her husband to prevent specific performance.

APPEAL AND ERROR: Reservation of Grounds—Questions First
 5 **Raised on Appeal.** Where no question was raised on the trial of the case, and no issue was tendered by the pleadings as to the claim, in an action for specific performance, that the wife had an interest in the land involved, other than her inchoate right of dower, the same may not be raised for the first time in the Supreme Court.

Appeal from Monona District Court.—J. W. ANDERSON,
 Judge.

OCTOBER 2, 1919.

REHEARING DENIED JANUARY 20, 1920.

ACTION in equity for specific performance of a contract for the sale of real estate. There was a decree for plaintiff, and the defendants appeal.—*Affirmed.*

C. E. Underhill and Sims & Kuehnle, for appellants.

J. A. Pritchard and C. C. Cooper, for appellee.

PRESTON, J.—Plaintiff's claim is that he and defendants, on March 16, 1917, entered into a written contract for the sale by defendant to plaintiff, acting for himself and C. C.

Jacobson, John R. Welch, and W. H. Leathers, of 480 acres of land near Mapleton, in Monona County, Iowa, at the agreed price of \$100 per acre; that \$4,000 was paid down on the contract; that there was to be a further payment of \$12,000 on March 1, 1918, and the balance was to be paid by plaintiff's assuming and agreeing to pay

1. SPECIFIC PERFORMANCE: contracts enforcible: sufficiency of evidence.

a mortgage of \$32,000, which was to be placed against the property, and which was to take the place of an existing mortgage. Plaintiff claimed that he had fulfilled the terms of the contract; that he was ready, willing, and able to carry out its terms, but that defendants refused to comply therewith. It was finally determined by the four parties interested in the purchase that the title should be taken in plaintiff's name. Defendants deny entering into the contract, but admit that their names were, in fact, signed thereto; they aver that the contract had been materially changed, since it had been signed by them, in that plaintiff's name did not appear therein as a proposed purchaser, and they did not understand it was to be written therein or signed thereto; that the signatures of the defendants to the contract were procured by fraud and deceit, practiced upon them by Jacobson, who, at that time, was cashier of the bank where defendants for a long time had been customers; that Jacobson was acting as the agent for defendants; that the land was worth \$15,000 more than the consideration named in the instrument, and that, under the circumstances, Jacobson should not be permitted to share in the increase in value; and that he secretly connived with plaintiff and others by falsely representing that the proposed purchaser was a resident of Omaha, and a man of means, able to perform his part of the contract; that, had they known that Jacobson or plaintiff or the others were, in fact, to be the purchasers, they would not have signed the contract; that, upon learning that plaintiff's name appeared in the contract as the proposed purchaser thereof, and of the fraud, they repudiated the contract; that the transaction is unconscionable; that its enforcement would operate as a legal fraud upon defendants; and that plaintiff has an adequate remedy at law. For reply, plaintiff says that, if the name of the grantee was different, as alleged by defendants, the defendants were estopped from denying the contract, for that they had accepted the

same after knowledge of who the grantee was, and had permitted the grantee to resell the land, with their knowledge, and without making objections. The defendant Barney Habinck is a farmer, and, with his wife and family, resides on a farm owned by him on the outskirts of Mapleton. The 480 acres in controversy are situated some $4\frac{1}{2}$ miles from his home farm. Defendant had owned the 480 acres for a good many years, and lived on it until they moved to the place nearer town. Defendants and plaintiff have been on very unfriendly terms for a number of years, and the same is claimed to be true as to Habinck and Lamp (who bought the land from plaintiff), but in a lesser degree, it seems. Habinck claims that plaintiff had had him arrested on different occasions, and it seems that defendant had others in the neighborhood whom he considered as his enemies. Part of this grew out of a school controversy. The town of Mapleton and a considerable portion of the surrounding country had been organized into a consolidated school district, in which was defendants' 480 acres. Defendants were greatly disturbed over the establishment of this district, and, under the evidence, placed this land in controversy in the hands of numerous agents, at \$100 per acre. For some time prior to the transaction in question, Habinck had been negotiating for the sale of these premises with a party from Omaha; but the sale was never consummated. Later, Jacobson, who was cashier of the bank in Mapleton where defendant transacted his business, Welch, president of the bank, Leathers, and plaintiff, who were all business men of Mapleton, decided to purchase the premises in controversy at the price asked by defendant. Jacobson negotiated the purchase. Defendant says that Jacobson told him that he had a purchaser from Omaha for the 480 acres, at \$100 an acre, and that the Omaha man had means with which to buy the land, and that Jacobson represented to defendant that it was an advantageous deal. Jacobson

denies that he claimed to be negotiating for an Omaha man. There is evidence that defendant said he did not care who got the land. The land was defendant's own land, which he had owned for some time, and he doubtless had a very good idea of the value thereof, though he claims he was only a farmer. There is some dispute in the testimony as to the value of the land. We suspect that the real reason for defendant's refusing to carry out his contract was the enmity between him and plaintiff. However this may be, defendant knew he was dealing with plaintiff, and that plaintiff had signed the contract as purchaser before the initial payment of \$4,000 was made, which defendant received with such knowledge, and he still retains the money. After the negotiations, Jacobson prepared a contract, with the name of the purchaser or purchasers left in blank, which was delivered to Habinck to take home for his wife's signature, and for Habinck to further consider. Habinck returned the contract to Jacobson, with Mrs. Habinck's signature attached. The purchasers were not ready, just then, to complete the contract, and he told Habinck to keep the contract in his possession until the following Monday, and then, if he was still disposed to sell the land, that they would complete it. On Monday morning, Habinck returned to the bank and delivered the contract, signed in duplicate by himself and wife. Plaintiff's claim is that, at the time the contract was first delivered to Habinck, it had not been decided which of the four parties should take title, or whether it should be all four, but later, it had been decided that the title should be taken in Scott, to hold in trust for the others. Habinck remained in the bank until Scott's name was filled in as the purchaser, and the contract signed by Scott. The contract was then delivered to Habinck, signed by Scott as purchaser, and by Habinck and wife. Habinck admits that, before he received the \$4,000, he knew Scott's name appeared as purchaser. Welch testifies that he is not sure that he told Hab-

inck who the purchasers were, and to take the contract home and think it over until Monday. We think it is established that Habinck fully understood this matter. Habinck says he was surprised when he saw Scott's name in the contract, because Scott had been his enemy for 20 years; that, some time after this, he told Jacobson that he was selling to his enemies, instead of to the Omaha man, and that, thereupon, Jacobson told him that he would sell the contract, and thereupon, defendant said to "crack away." Thereafter, the land was sold to other parties, as before stated. But Habinck received and used the money, after he and his wife signed the contract, and at no time had offered to refund it until the trial of the case. Neither did he attempt to cancel the contract or surrender it, during the time it was in his possession. Near the close of the trial, he, by his counsel, in open court, offered to return the contract for cancellation, and to return the money received by him to the plaintiff, or to whosoever might be entitled to it. Defendant claims, as to this \$4,000, that he gave a note for \$280, which would equal 7 per cent on the \$4,000 for a year, and that, if the trade went through, the \$280 should go to Jacobson as his commission, and that, if the trade fell through, the \$4,000 was to be treated as a loan, and the \$280 would be the interest on it; but plaintiff says that, ordinarily, a smaller payment of from \$4,000 to \$6,000 was paid down in such transactions, and that, if they were not to get possession of the land for nearly a year, it was agreed that the \$280 should be lumped as interest on about \$3,500, and that it was for interest only, and that it was not to go to Jacobson, but to be divided equally among the four purchasers. We do not regard this as very material, except that it may, perhaps, have a bearing on the question whether Jacobson was agent for defendant. At any rate, defendant kept the money, and used it to pay off a \$3,000 note of his own to the bank, before due, and checked out the balance at different times.

He made no objection, at any time, as to the persons who were the purchasers, until the trial. There is evidence that defendant told different ones that he had sold the land to Jacobson and those associated with him; that he was glad of the sale; that, a few days after he had completed the contract, he made application for a loan with Jacobson, as provided in the contract, signed and swore to the application, stating therein that he had sold the land to Scott; that he helped Jacobson to plat the land, showing the fences that belonged to the place. The purchasers of the land resold it to Lamp, who again resold to one Patrick. This is the general situation. It is conceded by counsel for appellant that the record is full of apparent inconsistencies on the part of Mr. Habinck and in his testimony. But they say that these inconsistencies are more apparent than real, etc. Though there is a conflict in the testimony at some points, we are satisfied with the findings of fact by the trial court, where there is a dispute, and this without setting out the testimony.

1. Two or three matters which seem to be of minor importance will be referred to briefly before taking up those which seem to be more seriously relied upon. We have already referred to the equities, and that the controverted points are sustained by the evidence. It is argued by appellants and conceded by appellee that actions for specific performance of contract for the sale of real estate are addressed to the sound, legal discretion of the court, and will be granted or denied as the justice and right of the particular case shall seem to the court. We think that, under the entire record, the equities are with the plaintiff, and that, therefore, the discretion which the trial court did exercise in favor of plaintiff was a proper and legal exercise thereof. In fact, there seems to be no controversy as to the law of the case. We have already briefly referred to the alleged false representations to defendant that the purchase of the

land was being negotiated for an Omaha party. As said, defendant at first said, and his wife said, that they did not know that plaintiff and his associates were the purchasers; but, as said, there was no claim that these parties were not able to perform the contract. Furthermore, they received the same price from these parties for which defendants were willing to sell to an Omaha party, had he concluded the contract. As to the proposition that defendants, some time after the transaction, concluded that they did not wish to sell to the parties, some of whom were thought to be unfriendly to defendants, the testimony of Mr. Habinck as to this is denied.

As to the alleged inadequacy of consideration, we have held that this is not itself a sufficient ground for refusing specific performance, at least unless it is so gross as to shock the conscience. We shall not go into

2. SPECIFIC PERFORMANCE: contracts enforceable: inadequate consideration.

the evidence as to this, but content ourselves with saying that we are satisfied with the finding of the trial court at this point.

There was evidence for plaintiff that defendant stated to others that he got a good price for his land. He had been offering to sell it at the price which he received.

It is contended by appellants that, under the evidence, Jacobson was the agent of Habinck, and as such was disqualified from becoming interested in the purchase without the knowledge and consent of Habinck. It

3. CONTRACTS: performance or breach: agent as purchaser.

is squarely denied by Jacobson that he was the agent for Habinck, and the trial court seems to have found for plaintiff. But even

if he was, Habinck did not repudiate the transaction, but, on the contrary, acquiesced therein, consented thereto, and accepted the first payment on the purchase money; and there were intervening rights of other parties.

2. It is next contended that plaintiff was not entitled to a decree of specific performance, because the contract is

not enforceable against Mrs. Habinck, even though the contract is established as against her husband, since her signature to the contract was obtained by fraud, in that she did not know that Scott was to be the purchaser. We are cited to *Healy v. Hohn*, 157 Iowa 375, 397.

4. SPECIFIC PERFORMANCE: contracts enforceable: fraud in obtaining wife's signature.

In that case, the trial court found that there was not a completed contract, either because the wife was to sign it, or defendant was to be satisfied with an unsecured note before the contract was to become effective, and there was a conflict in the testimony as to whether these two things were to be done. The court, in that case, considered it a circumstance in favor of defendants, and their contention that such was the agreement, that the parties considered it was necessary that the wife should sign; and the court said that this was not conclusive, because, under our law, it might be enforceable against the husband without the wife's signature. But in the instant case, neither defendant is asking that a portion of the purchase price be withheld and deposited. Aside from this, Mrs. Habinck testified in regard to her husband's bringing the contract to her, and stating to her that the purchaser was an Omaha man; that she said to her husband that they had had so much trouble with their enemies that he had better sell it to the Omaha man; and that, thereupon, she signed the contract. She says further:

"I did sign the contract, and knew on the 19th day, Monday, that Mr. Scott's name had been put in the contract."

And after that, Mr. Habinck used the \$4,000, checking it out over a period of several months, and Mrs. Habinck made no objections. There was no representation to Mrs. Habinck by plaintiff or any of his associates in regard to the purchaser's being an Omaha man. Again, in a sense, she was not really a party, so far as her inchoate right of dower is concerned. Her husband was to furnish the title.

Her name to the contract was only necessary in order that her husband might be held to specific performance, and that she might be forced to join, if she refused. She was not furnishing title. She could not maintain an action for damages, nor could she be held for damages if she broke the contract. As said, Mr. Habinck clearly has no standing, and we think that the trial court did not err in finding for plaintiff as to the claim of Mrs. Habinck. Another

5. APPEAL AND
ERROR: reser-
vation of
grounds: ques-
tions first raised
on appeal.

claim made by defendants is that Mrs. Habinck had an interest in the land in addition to her inchoate right of dower, and that she was, therefore, a necessary party. But this question seems not to have been raised in any way in the trial of the case. No issue of that sort was tendered by the pleadings. Indeed, the matter seems to have been referred to only incidentally during the trial. Habinck testified, among other things, when he was recalled, that he had the record title of this land, and in his name, and Mrs. Habinck testified, on redirect examination:

"I have \$3,000 from my home given to me, that was invested in this 480 acres. Just let Mr. Habinck use that in the land. It was never invested while we lived on the place. It did not go into the other place or anything. It was invested in that 480 acres. So I had that much interest in addition to my dower interest, as they call it, in the land."

The evidence heretofore set out as to her conduct has a bearing on this question. But appellees contend, and cite authority in support of their proposition, that a new question may not be raised for the first time in the Supreme Court. We shall not prolong the discussion as to this.

As said, we think the equities are with the plaintiff, and further, that plaintiff's plea of estoppel is well taken.

We reach the conclusion that the decree of the trial court was right, and it is, therefore,—*Affirmed*.

LADD, C. J., EVANS and SALINGER, JJ., CONCUR.

STATE OF IOWA, Appellee, v. PAT O'BRIEN, Appellant.

CRIMINAL LAW: *Alibi—Instructions.* It is not error for the court to instruct that defendant's evidence on the issue of alibi must outweigh the evidence introduced by the State to show that the defendant was engaged in the commission of said crime.

Appeal from Pottawattamie District Court.—SHELBY CULLISON, Judge.

JANUARY 20, 1920.

THE defendant was convicted of the crime of robbery, and appeals. The facts, so far as necessary to an understanding of the case, are stated in the opinion.—*Affirmed*.

John Tinley and Tinley, Mitchell, Pryor & Ross, for appellant.

H. M. Havner, Attorney General, *F. C. Davidson*, Assistant Attorney General, and *Charles W. Lyon*, for appellee.

WEAVER, C. J.—The testimony on part of the State is to the effect that, about the hour of 10 o'clock on the night of June 9, 1917, W. G. Patton and John Buchanan together were walking from some point in the city of Council Bluffs in the direction of their respective places of residence, a little outside of the municipal limits. At the point where their routes separated, they stopped for a moment's conversation, and, while so engaged, they were approached by a man who drew a gun upon them in a threatening manner, and compelled them to hold up their hands while he searched their clothing and persons. From the person of Patton he

took and carried away about \$17 in money, and a watch and chain valued at \$50, and with the booty thus secured, disappeared in the darkness of the night. Two days later, the defendant was arrested, charged with the robbery.

On the trial, both Patton and Buchanan positively identified the appellant as the man who assaulted them and took the money and watch from Patton. Another witness, a policeman, also testifies to having seen the appellant in that immediate neighborhood, within a few minutes of the time of the robbery.

As a witness for himself, appellant denies his guilt, and swears that he was at his home during the entire night of the date named. He also offers other evidence, having more or less tendency to corroborate his defense. Nothing is clearer than that such case is for the jury, and that its verdict of guilty cannot be said to be without sufficient support.

Indeed, council do not attempt to argue that the verdict should be set aside on that ground, but base their demand for a reversal upon an alleged error in the charge of the court to the jury. In Paragraph 10 of its charge, the court directed the jury's attention to the matter of the defendant's alleged alibi. After defining and stating the nature of this defense, the court then proceeded as follows:

"The burden rests with the defendant to show this defense by the greater weight or preponderance of the evidence. It need not be shown beyond all reasonable doubt, but, in order to make it out, it must appear by the greater weight or preponderance of the evidence. If it appears from the evidence that, at the time the crime was being committed, if one was committed, the defendant was at his home, or at some place other and different than the place where the crime is claimed to have been committed, then the defendant should be acquitted. By a preponderance of the evidence, as the term is here used, is meant that the evi-

dence introduced by the defendant to show that he was at such other and different place at the time said crime was committed must *outweigh the evidence introduced by the State to show that the defendant was engaged in the commission of said crime.*"

The criticism which counsel make of this instruction is directed against the closing sentence, which we have italicized. It is said that the only burden which the law places upon the accused who undertakes to establish an alibi has relation to time and place, and nothing more, and that this burden is improperly increased by charging that the testimony in its support must outweigh the evidence offered by the State to show that such accused person was engaged in the commission of the offense charged.

The language referred to could have been omitted without impairing the proper effect of the charge, because the true rule, as contended for by counsel for appellant, had been given and repeated elsewhere in such charge; but we are quite unable to conceive in what manner its giving could have worked any prejudice or injury to the defense. To say to the jury what counsel argue ought to have been said, that defendant's evidence tending to show he was at another and different place at the time the offense was committed must outweigh the State's evidence, tending to show that he was present at the time and place of the offense, has its fair equivalent in the trial court's statement that, to establish his alibi, the evidence tending to show he was elsewhere must outweigh the State's evidence that he was engaged in the commission of the crime.

It is hardly possible to conceive how the jury could have been misled to the defendant's prejudice by the court's use of the language criticised, or what other meaning the jury could have drawn from these words than the very idea which counsel say should have been embodied in the charge: *that, to establish an alibi, the burden is upon the accused,*

who asserts it, to show by a preponderance of the evidence that, at the time of the alleged offense, he was at another and different place; which, if true, precludes the idea or his participation therein.

The exception to the instruction cannot be sustained. We find no prejudicial error in the record, and the judgment of the trial court is—*Affirmed*.

LADD, GAYNOR, and STEVENS, JJ., concur.

STATE SAVINGS BANK OF LOGAN, Appellee, v. O. R. OSBORN
et al., Appellants.

EVIDENCE: Parol as Affecting Writing—Want or Failure of Consideration—Conditional Delivery. Parol evidence is admissible between the holder of a promissory note and an endorser (the original parties) to show that the endorsement was made: (1) Without consideration—without the assumption of any liability on the part of the endorser; (2) on a consideration that had failed; (3) on the *condition* that the holder would see that the note was paid from other property of the maker then in the hands of the holder. (Sec. 3060-a16, Code Supp., 1913.)

Appeal from Harrison District Court.—E. B. WOODRUFF,
Judge.

JANUARY 20, 1920.

ACTION at law upon a promissory note. Judgment for plaintiff against the defendant Davis, who appeals.—*Reversed*.

Robertson & Havens, for appellant.

J. A. Murray, for appellee.

WEAVER, C. J.—The note in suit appears upon its face to have been made by Osborn to the appellant Davis, who is alleged to have endorsed it to the plaintiff bank.

Defendant denies liability. The answer filed is unconscionably long, verbose, and involved in its statements, and, had the trial court stricken it on that account, giving defendant opportunity to replead his defense in better form, we should have no difficulty in affirming the order.

Stating the defenses on which reliance is placed, in briefer terms, they are, as we understand them, about as follows: (1) Denial made in general terms; (2) want of consideration for the appellant's endorsement of the note; (3) failure of consideration for the endorsement; (4) payment of the note by Osborn; (5) that there was never any delivery of the endorsed note to the plaintiff, or that the delivery was, at most, conditional; and (6) that the note was endorsed in consideration of a representation by the bank that it held a mortgage on Osborn's property of sufficient value to secure payment of all his debts to the bank, including the note in question, and that, if appellant would endorse said note, the bank would proceed to collect the same from the proceeds of the sale of said mortgaged property, and would apply the first money received on such sale to the payment of said note; that said promise and agreement were never performed, and were never intended to be performed, but were made with the fraudulent intent and purpose to entrap the appellant into an endorsement of the note, and that plaintiff did, in fact, collect enough from the security held by it to pay the note, but failed to apply it upon such indebtedness, as agreed.

The alleged facts on which these various defenses are sought to be founded are substantially as follows: The appellant Davis, a farmer, was about to hold a public sale, to dispose of a considerable quantity of personal property. Preparatory to such sale, he entered into an agreement with the bank by which said bank was to purchase all the promissory notes given by purchasers of the property so sold, and to that end, and to satisfy itself of the financial respon-

sibility of the makers of the notes, the bank was to be represented at the sale by one of its officers, who was to act as clerk, and to take the notes payable directly to itself, without endorsement or guaranty by the appellant. The sale was held, as contemplated. One Joy, an officer of the bank, served as clerk, and took the notes, making them all payable, as agreed, direct to the bank, except one note given by Osborn for \$374.70. In making settlement with Osborn, Joy, contrary to the agreement between appellant and the bank, inserted the name of appellant as payee of the note, without appellant's knowledge or consent. At some time after the note of Osborn had been so taken by Joy, the latter requested appellant to endorse the note, as a matter of temporary accommodation only; and, upon the promise that the note so endorsed should not be considered delivered, as between appellant and the bank, and that the bank should hold it in possession only temporarily, until it could get a new note and security from Osborn for all his indebtedness to the bank, including said note, appellant did make the endorsement.

Later, as we understand the answer, the bank did obtain a new note from Osborn, stamped the first note "paid," and delivered it to Osborn. Thereafter, the appellant, at the request of the bank, endorsed the new note it had theretofore obtained from Osborn. The pleading further shows that, to obtain said endorsement, the bank, by the officer having the matter in charge, stated and represented to the appellant that it held a chattel mortgage on the property of Osborn to the value of more than \$500, and that, if appellant would make the endorsement requested, the bank would credit and apply the first moneys collected from Osborn or from the said security to the payment of said note; and that, relying upon said representation and promise, appellant did endorse the note; that, thereafter, the bank did collect from the sale of said mortgaged property more

than enough money to pay and discharge said note, but, in violation of its agreement, it applied or credited such collections upon other claims held by it against Osborn.

The narrative of these alleged facts is restated and repeated, in various forms and with various embellishments; but what we have said is sufficient, we think, to enable us to get at the meat of the controversy on which we are asked to pass. The amended and substituted answer, setting up the defense or defenses to which we referred, was not demurred to; but plaintiff moved the court to strike out substantially everything contained in the pleading (except mere denials) as being "incompetent, irrelevant, and redundant matter." The motion was sustained, and, defendant excepting to the ruling and declining to further plead, judgment was rendered against him for the amount of the note.

In entering the ruling, the court explained its action by saying:

"This answer suggests what might raise several issues; but it seems to the court that, under the negotiable instrument law, the endorsement by the defendant upon the original note, of which the note in suit is but a renewal, would not admit of oral evidence to explain such endorsement."

I. Is there anything in the Negotiable Instruments Act which precludes the defense which appellant pleaded? Counsel for appellee lay much stress, in argument for an affirmance, upon the proposition that defendant, by its answer, set up a plea of fraud in the procurement of his endorsement; and it is said that the matters so pleaded are, at most, mere promises, to be performed in the future; and that a failure to so perform does not amount to fraud. As a general, abstract proposition, this is, no doubt, true. It is also true that the answer indulges very freely in the words "fraud" and "misrepresentation;" but, when shorn of its unnecessary and luxuriant verbiage, we still have left a

fairly intelligible plea of want of consideration and failure of consideration for the appellant's endorsement.

There is nothing in the Negotiable Instrument Act or in the familiar rule against parol evidence to vary the terms or legal effect of a writing which, as between the original parties, precludes plea or proof of no consideration or failure of consideration. *Farmers Sav. Bank v. Hansmann*, 114 Iowa 49; 7 Cyc. 690; *Agricultural Bank v. Robinson*, 24 Me. 274; *Lackawanna Trust Co. v. Carlucci*, 264 Pa. 226 (107 Atl. 693); *Coghlin v. May*, 17 Cal. 515.

The general principle of the law of contracts, that, to be valid and legally enforceable, as between the parties thereto, an agreement or undertaking of any kind must be supported by a consideration, is too elementary to call for citation of authorities. To that rule, commercial paper affords no exception.

This is not a case in which the plaintiff occupies the relation of an innocent purchaser of the paper or a holder in due course, if the allegations of the answer be true,—and, for the purposes of the appeal, they must be accepted as true, or, at least, as being susceptible of proof. The allegation is to the effect that the bank had entered into an agreement to purchase all the notes taken at the sale, and assure itself of the sufficiency of such notes by having its own officer act as clerk, make settlement with the purchasers, and take their notes direct to the bank itself, without the assumption of any personal liability thereon by the appellant. According to the pleading, the appellant never at any time had possession of or exercised any dominion over the note. It was taken by the bank, and was at all times held by it; and the endorsement was made, not by way of negotiation of the paper to the bank, but was a subsequent act or independent transaction which, if the answer be true, would require some consideration other than the original agreement. And if, as counsel say, the bank paid

for the note at the same rate and in the same manner as it paid for the other notes, it only did what it had bound itself to do. Still assuming the truth of the answer, it must be said that the notes, when taken, and all of them, including the Osborn note, were, all alike, the property of the bank from the moment of their execution and delivery to Joy for the bank. It was not within the power of Joy or the bank to avoid this result by inserting the appellant's name as payee in the Osborn note, without his knowledge or consent. Under such circumstances, the appellant was charged with no duty or obligation to take upon himself the liability of endorser. He was, in such case, no more than the nominal payee of the note; and if, under such circumstances, without some new or additional consideration, he did endorse the paper for no other purpose than to pass title thereto to the bank, or solely as a matter of temporary accommodation, to serve the purposes of the bank, then his plea of want of consideration would present a legitimate defense to any action upon his endorsement.

Appellee says, in avoidance of this defense, that, even if this be true as to the note and endorsement first made, it has no relevance at this time, because this action is upon a new note and new endorsement. Without taking time to consider other features of the answer bearing upon the proposition so urged, we think it quite clear that appellant does plead a failure of consideration as to this endorsement also, as we have before pointed out. The answer alleges that this last endorsement was made upon the assurance and promise of the bank that it held security by chattel mortgage upon the property of Osborn to a value in excess of this debt, and would apply the first money realized from such security to its payment. It is also alleged that, having thus secured the defendant's endorsement, the bank did collect and receive from said security an amount of money sufficient to pay off the note; but, instead of so applying it, as agreed.

it used the money in payment of other claims against Osborn, leaving the note in suit still unpaid. If this be true,—and, for present purposes, it must be so taken,—then there was a palpable failure of consideration for the endorsement, and appellant may plead it in defense. *Farmers Sav. Bank v. Hansmann*, 114 Iowa 49.

The foregoing is sufficient to indicate our view that the trial court erred in striking the defendant's answer, and that the judgment rendered against him must be reversed, and new trial ordered.

What we have said in this opinion in relation to matters of fact will, of course, be understood as having reference to the sufficiency of the answer, and not to the merits of the dispute between the parties. That is a subject to be considered only when the issues have been framed, and the parties have both had opportunity to be heard.

For the reasons stated, the judgment below is reversed and cause remanded for further proceedings in harmony with this opinion.—*Reversed*.

LADD, GAYNOR, and STEVENS, JJ., concur.

JOSEPH WAGNER, Appellee, v. THORVALD KLOSTER, Appellant.

NEGLIGENCE: Imputed Negligence—Riding on Invitation. A per-

1 son riding with another on invitation is not chargeable with
the negligence of the driver on the mere showing that they are
engaged in a "common" enterprise. It must appear that the
invited party *had* the right or *assumed* to have the right to
control the movements of the driver.

1 **HIGHWAYS: Excessive Speed by Automobile.** Negligence may be

2 presumed from the operation of a motor vehicle at a speed ex-
ceeding 25 miles per hour. (Sec. 1571-m19, Code Supp., 1913.)

HIGHWAYS: Law of Road—Crossing Intersections. Principle rec-

3 ognized that travelers passing each other at right angles at in-
tersections are not controlled by the statute which requires them

to turn to the right when *meeting*. (Sec. 1569, Code Supp., 1913.)

TRIAL: Instructions—Correct But Not Explicit. Lack of explicitness in a correct instruction is waived by failure to request a more explicit one.

Appeal from Plymouth District Court.—WILLIAM HUTCHINSON, Judge.

JANUARY 20, 1920.

ACTION for damages consequent on a collision of automobiles, resulted in a verdict for plaintiff and judgment thereon. The defendant appeals.—*Affirmed*.

Nelson Miller, for appellant.

Kass Bros. & Sievers, for appellee.

LADD, J.—I. At about 5 o'clock in the afternoon of July 22, 1917, Joseph Collins was returning from a picnic on the Floyd River near Carnes. In the back seat of his automobile sat his wife and two daughters.

1. NEGLIGENCE: imputed negligence: riding on invitation. The plaintiff, a brother of Mrs. Collins', rode with him in the front seat; and, as they reached the crest of a hill, in going east, plaintiff remarked to Collins, "there comes a car from the south;" and both observed the defendant's automobile at the top of a knoll on the north and south road, some 15 or 20 rods south of the intersection. With defendant were his son, two daughters, and a friend. As Collins' automobile was passing near the center of the intersecting highways, the right wheel of defendant's car struck the back wheel of Collins' automobile, throwing plaintiff through the windshield, and causing serious injuries to his person. Recovery for damages sustained thereby is sought in this action. The grounds of negligence alleged are that the defendant operated his car at an excessive and careless rate of speed,

and that, knowing plaintiff to be in peril, he failed to exercise ordinary care to avoid the collision. The sufficiency of the evidence to carry to the jury the issues as to whether the defendant was negligent in the respects alleged, and plaintiff free from contributory negligence, is challenged. The evidence, without dispute, indicates that plaintiff was the guest of Collins. He was employed by one Bogh as a farm hand, and in the evening previous, both Collins and his wife told him of the picnic, and asked if he would like to go. Upon being assured that he would, they invited him to accompany them home, and ride to the picnic with them. All understood that he was accompanying them gratuitously, as their guest. He neither exercised, nor had the right to exercise, any control over the car, and there is no ground whatever for holding him responsible for the negligence, if any, of Collins. In a sense, they were pursuing a common purpose,—that is, returning from the picnic,—and plaintiff was to be let out at his employer's home. This was merely incidental to the trip, and, as he had no voice in what was done, he cannot be said to have engaged in a common enterprise. As said in *Nesbitt v. Town of Garner*, 75 Iowa 314:

"The law will not create or presume the relation [of principal and agent] from the mere fact that he accepted the invitation of another to ride in his carriage. If he is but the guest of the other, and neither has nor assumes the right to direct or control the conduct of the driver, neither he nor the owner can be regarded as his servant. In such a case, he would not be answerable to a third person for an injury caused by the negligence of the driver, and it seems to us that there is no principle of law upon which such negligence can be imputed to him when it contributes to his own injury."

To defeat the plaintiff's recovery, his relations to Collins, the driver, must have been such as to render the plaintiff in some manner responsible for the acts or omissions of

Collins, and these must have been negligent, and have contributed to the injury. In other words, they must have been engaged in a joint venture or common enterprise, in the management of which each was possessed with some authority to control, at least in the respect in question, and to the extent that each, in what he may have done, can be said to have acted for the other. Parties cannot be said to be engaged in a joint venture or common enterprise, within the meaning of the law, unless there be a community of interest in the objects or purposes of the undertaking, and an equal right in each to direct and govern the movements and conduct of each other with respect thereto. Each must have some voice and right to be heard in its control or management. See *St. Louis & S. F. R. Co. v. Bell*, 58 Okla. 84 (L. R. A. 1917A 543). In *Withey v. Fowler Co.*, 164 Iowa 377, it was said that, to impute the driver's negligence to another occupant of the carriage, the relation between them must be shown to be something more than host and guest. See *Cram v. City of Des Moines*, 185 Iowa 1292, for review of decisions on the doctrine of imputed negligence. In *Shultz v. Old Colony St. R. Co.*, 193 Mass. 309 (8 L. R. A. [N. S.] 597), the court reviewed a great number of decisions from the different states, and reached the conclusion that the rule fairly deducible therefrom is that:

"Where an adult person, possessing all his faculties and personally in the exercise of that degree of care which common prudence requires under all the surrounding circumstances is injured through the negligence of some third person and the concurring negligence of one with whom the plaintiff is riding as a guest or companion, between whom and the plaintiff the relation of master and servant, or principal and agent, or mutual responsibility in a common enterprise, does not in fact exist, the plaintiff being at the time in no position to exercise authority or control over the driver, then the negligence of the driver is not imputable to the injured person, but the latter is entitled to recover

against the one but for whose wrong his injuries would not have been sustained. Disregarding the passenger's own due care, the test whether the negligence of the driver is to be imputed to the one riding depends upon the latter's control, or right of control, of the actions of the driver, so as to constitute in fact the relation of principal and agent or master and servant, or his voluntary, unconstrained, noncontractual surrender of all care for himself to the caution of the driver."

In *Anthony v. Kiefner*, 96 Kan. 194 (L. R. A. 1915 F, 876), one Kiefner, who had recently purchased an automobile, invited his mother to ride with him, and, in accepting, she took her place at the wheel, and drove the car for about three blocks. The son then resumed his place, and drove thereafter. Owing to negligence, as was found, on the part of the son, the car collided with another, and caused the death of Mrs. Anthony, and judgment for damages was recovered against the mother, as well as her son. She had informed her son of her desire to stop to get a cake which Mrs. Norris had made for her, and, on the strength of this, the jury found, in response to a special interrogatory, that she had participated in the management of the car by "directing its destination." The court, in disapproving this ruling, said:

"If they had set out on a business errand, to collect cakes or the like, instead of a pleasure ride, or if in executing any common purpose in which both were exercising control, or in any case where one might be said to be the agent of the other, it might be held that there was a joint adventure and joint liability. The call proposed to be made on the trip was a mere incident of the ride and created no more responsibility for the driver's act than if he had been operating a taxicab or some other public conveyance. In no sense did her request create the relation of principal and agent or master and servant between them, nor give the journey the character of a joint enterprise. The fact that

an owner of an automobile who has invited a guest to ride with him takes a particular course at the request and for the pleasure or convenience of the guest does not indicate management of the automobile nor result in responsibility of the guest for the conduct of the owner and operator."

These decisions correctly state the rules, and are sustained by the overwhelming weight of authority. As pointed out, the injured guest or passenger must be responsible, to some extent at least, for the conduct of the driver, before the negligence of the latter, contributing to his injury, can defeat recovery from a third party, perpetrating or participating in the perpetration of the wrong causing such injury. If he have the right to direct the operation or control of the automobile, or so does, the driver is but his agent or servant. So, too, is he in such relation when the vehicle is made use of in a joint venture or common enterprise; for therein each enjoys equal rights, and each is acting for both in carrying out their common design. In the case at bar, the defendant is found to have done the wrong which injured plaintiff, who also was found not to have contributed thereto. The circumstance that the negligence of some third party contributed thereto ordinarily would not bar recovery. The party injured, if without fault, ought not to go remediless against one but for whose wrongful act he would have been unharmed. To hold otherwise necessarily requires the inference that, in accepting the invitation as a guest to ride in the automobile, the invited person somehow entered into a contractual relation, whereby the driver became his agent or servant. No argument is essential to dispose of such a fallacy, though decisions are to be found in which such a relation is implied. Both persons would repudiate such an inference, and the association as host and guest is, in itself, repugnant to any thought of contract.

We reach the conclusion that, to warrant the denial of

recovery by a guest invited to ride in an automobile, on the ground that the negligence of the driver contributed to his injuries, it must appear that the guest was in some manner responsible for what the driver did. He must have either directed the operation of the car or have had the right so to do, or have been engaged in some joint venture or common enterprise wherein each, in what was done, was acting for both. A person invited unconditionally to ride with the driver of an automobile as a guest to some place or on some trip, or generally for pleasure, does not thereby enter upon such a joint venture or common enterprise as renders him responsible for the acts or omissions of the driver, within the meaning of the law. Something more is essential to accomplish this: i. e., their relations must be such that each, in what he does in carrying on the common purpose, may be said not only to act for himself, but for the other; and in no event is the negligence of the driver to be imputed to the guest or passenger, unless the guest or passenger has the right to direct or control in some manner the operation of the vehicle, or, in fact, does exercise some control in the management thereof. It is manifest from the evidence that plaintiff was not responsible for what Collins did in the operation of the automobile, and the negligence of Collins, if any, might not be imputed to plaintiff.

II. The plaintiff, even though a guest, must have exercised ordinary care for his own protection. He was not remiss in keeping an outlook, for he directed Collins' attention to defendant's approach, when each was a considerable distance from the intersection. According to several witnesses, Collins' automobile did not exceed in speed 15 miles an hour, and the evidence that he was an experienced and careful driver was undisputed. In these circumstances, it cannot be said that plaintiff, as an ordinarily prudent and cautious person, must have interfered with the operation of the car by suggesting that it stop or slow down before

reaching the intersection. Whether the exercise of ordinary care exacted that plaintiff should have done more than he did, was for the jury to determine.

III. Nor can it be said that the record is without evidence from which the jury might have found that defendant was negligent in driving his automobile at an excessive rate

of speed, but for which the collision would

2. HIGHWAYS: excessive speed by automobile. not have occurred. Five witnesses who observed his approach from the top of the knoll testified that, in their opinion, his ve-

hicle was moving at a speed of from 40 to 50 miles an hour. Section 1571-m19, Code Supplement, 1913, denounces a speed exceeding 25 miles an hour as presumptively negligent. The jury might have based a finding of negligence on this evidence, and concluded that, but for such excessive speed, Collins' car would have passed without being struck by that of defendant. The estimates of the distance from the intersection south to the top of the knoll was 15 to 20 rods, and from the intersection to the crest of the hill west, 10 to 25 rods. If the estimates of these distances were correct, then, of course, the opinions as to the relative speed of the cars was erroneous. All these estimates were merely matters of opinion, however, and it was for the jury to say, from all the evidence, whether the defendant was driving at a negligent rate of speed when the cars collided.

IV. The defendant swore to turning his car to the left when about 20 feet from the place of collision, but three witnesses in behalf of plaintiff testified that the car was not

swerved to the right or left. According to

3. HIGHWAYS: law of road: crossing intersections. his story, he noticed Collins' automobile for the first time when each was about 50 or 60 feet from the place of collision; and, as his

right wheel struck the back wheel of Collins' car, the jury might have concluded that, in the exercise of ordinary care, he might have veered or turned his car to the left, and have

avoided the collision, and in failing so to do was negligent. Even if the cars were approaching at the speed thought by defendant, Collins' automobile at 30 miles an hour and that of defendant at 15 miles per hour, the jury might the more readily have reached the conclusion that he might have turned the car to the left of Collins; for, though there was a post and a mail box to the right, the road to the left was clear and passable. Appellant, however, argues that the defendant had the right of way, and that Collins was bound to stop and allow the defendant first to pass, according to the law of the road; and relies on *Hubbard v. Bartholomew*, 163 Iowa 58. That decision does not purport to deal with cars approaching an intersection at right angles, and it is quite generally held that a statute in substance requiring travelers meeting on the highway to turn to the right, has no application to the situation where travelers meet at the junction of two highways. The rule of the common law applies in such cases, and each person must exercise ordinary caution to avoid a collision. *Lovejoy v. Dolan*, 10 Cush. (Mass.) 495; *Norris v. Saxton*, 158 Mass. 46 (32 N. E. 954); *Morse v. Sweeney*, 15 Ill. App. 486; *Gilbert v. Burque*, 72 N. H. 521 (57 Atl. 927). If Collins, as a reasonable, cautious, and prudent man, believed that he would be able to drive over the intersection before the defendant reached it with his automobile, then he was not negligent in undertaking to do so; and if the defendant, by reason of his excessive speed or the negligent management of his car, collided with Collins, he was liable.

The defendant excepted to Instruction No. 9, submitting to the jury whether plaintiff had or assumed the right to direct or control the operation of Collins' automobile, on the ground that the doctrine of imputed negligence was not correctly stated. As seen, the evidence was not such as to bring that doctrine into the case, and the issue submitted was not raised by the evidence. There is no exception on

this ground, however; and, if there were, the defendant could not well have been prejudiced thereby.

Appellant also criticises the instructions for that, as is said, they are not balanced. The jury was told that:

“If plaintiff, at the time and place in question, did not exercise that care of his person, while riding with said Collins at the time and place in question, which a careful and prudent person would have exercised under the same or like circumstances, and the failure on his part to exercise this care contributed to the injury and damage of which he complains, then he cannot recover. But all that was required of this plaintiff, at the time and place in question, was that he conduct himself as a reasonable, cautious, and prudent man would do under the same and like circumstances to prevent injury to himself.”

4. TRIAL: In-
structions:
correct but
not explicit.

The criticism is that the jury was not advised of the respects in which plaintiff is claimed to have been negligent. Had the defendant desired more specific instruction, he should have requested it. In the absence of such request, the court is not required to direct the jury's attention to specific phases of the evidence. This rule is too well established to require the citation of authority. We discover no reversible error, and the judgment is—*Affirmed*.

WEAVER, C. J., GAYNOR and STEVENS, JJ., concur.

W. WEIDITSCHKA, Administrator, Appellee, v. SUPREME TENT
KNIGHTS OF MACCABEES OF THE WORLD, Appellant.

INSURANCE: What Law Governs. The validity and construction
1 of a contract of insurance are governed by the laws of the state
where the final act occurs which makes the contract binding.
So held where a certificate was issued in a foreign state, but de-
livered in this state after initiation and payment of fee there-
for and first assessment.

CONSTITUTIONAL LAW: "Full Faith and Credit" clause.

2 violation of the "full faith and credit" clause of the Federal Constitution is involved by construing a contract of insurance according to the laws of the state where the contract is consummated, and compelling payment to the one legally entitled to the same, even though such person is not specifically named in the contract, and even though the indemnity has been paid to an unauthorized person who is named as the beneficiary in the contract.

INSURANCE: Prohibited Beneficiary—Foreign Company. A foreign fraternal beneficiary association may not, in a policy delivered by it in this state, validly make the indemnity payable to one who could not legally be such beneficiary in a policy issued by a resident association. (See Sec. 1824, Code, 1897; Sec. 1832, Code Supp., 1913.)

INSURANCE: Illegal Beneficiary—Insurer as Beneficiary. A fraternal beneficiary society may not validly provide that the society itself shall be the beneficiary in case the designated beneficiary shall fail for illegality.

INSURANCE: Indemnity Passing to Insured's Estate. Failure of a designated beneficiary, in a fraternal beneficiary certificate, to take the indemnity, because of illegality in such beneficiary to be such, passes the indemnity to the insured's estate.

ALIENS: Abatement of Action (?) or Continuance (?) An action may not be wholly abated on the sole ground that the plaintiff is a nonresident alien enemy. The utmost impediment which the court should interpose in such a case is to continue the action until peace is restored between the belligerent countries.

Appeal from Bremer District Court.—JOSEPH J. CLARK,
Judge.

JANUARY 15, 1919.

SUPPLEMENTAL OPINION ON REHEARING, JANUARY 20, 1920.

A certificate of insurance was issued, January 16, 1905, by defendant, a fraternal society organized under the laws of Michigan, with indemnity of \$1,000 in event of death of William Nuhn, payable to Lillian I. Ingalls, described therein as a dependent. The assured died, May 24, 1913. Proofs

of loss were furnished, and the indemnity paid to the beneficiary named. Weiditschka was appointed administrator of the decedent's estate, June 27th following, and this action begun by him, as administrator, to recover the indemnity, March 19, 1914. To the petition praying for recovery, the defendant interposed several defenses. Demurrer to five of these was sustained. As to the sixth defense, the cause was continued. The defendant appeals.—*Affirmed.*

Sager & Sweet and *Miller & Wallingford*, for appellant.

Pickett, Swisher & Farwell, Henry Vollmer, and F. P. Hagemann, for appellee.

LADD, C. J.—A certificate of membership was issued to William Nuhn, January 16, 1905, by the defendant, a fraternal beneficiary association, organized under the laws of Michigan. Its funds are raised by assessment. It is managed for the benefit of its members, and not for profit. The beneficiary named in the certificate was Lillian I. Ingalls, a dependent, not related in any way to the assured. Upon the death of Nuhn, May 24, 1913, proofs of loss were submitted, and the association paid the stipulated indemnity to the beneficiary named. W. Weiditschka was appointed administrator of decedent's estate, June 27th following. This suit for such indemnity was begun March 19, 1914, by the administrator of decedent's estate, and is met with several objections to recovery.

I. The association has a lodge system, with ritualistic form of work. Nuhn applied to a local lodge at Waverly, Iowa, known as Waverly Tent No. 2, for membership, and the application was mailed by its officers to the head officers of the association in Michigan, by whom it was accepted, and the certificate of membership issued and mailed to the record-keeper of Waverly Tent No. 2, and by him coun-

1. INSURANCE:
what law
governs.

tersigned, and then delivered to Nuhn. Thereupon, the latter was initiated into the association by the local lodge, paid the fee asked therefor, and his first assessment.

Contrary to appellant's contention, the contract of insurance so consummated is governed by the laws of Iowa, rather than those of Michigan. The recent cases are quite in accord in holding that the place where the final act occurs which makes the insurance binding is the place of the contract, and that the validity and construction of the contract are, therefore, to be determined by the laws of that place. *Northwestern Mut. Life Ins. Co. v. McCue*, 223 U. S. 234 (56 L. Ed. 419); *Haas v. Mutual Life Ins. Co.*, 90 Neb. 808 (Ann. Cas. 1913 B. 919, with cases collected at page 926); *Wilde v. Wilde*, 209 Mass. 205 (95 N. E. 295). See *Collver v. Modern Woodmen*, 154 Iowa 615, as to agency of the officers of local lodge in such a case. Nothing in *Bush v. Modern Woodmen of America*, 182 Iowa 515, is in conflict with the above. The question under consideration was not involved in that case.

II. It is argued, however, that the decision we reach would violate the clause of the Constitution exacting that:

"Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state." Section 1, Art. IV, Constitution of the United States.

2. CONSTITUTIONAL
LAW: "full
faith and
credit" clause.

Nothing in violation of this clause can be inferred from a decision that the contract is governed by the laws of the state where made, rather than where one of the parties was organized and has its chief place of business, nor enforcing that contract by compelling compliance therewith by payment to the person entitled thereto, even though the amount has been turned over to another.

The defendant association had no right to transact business in this state without permission, and even then was

bound to proceed in accordance with its laws. *Nelson v. Nederland Life Ins. Co.*, 110 Iowa 600;

3. INSURANCE:
prohibited ben-
eficiary: for-
eign company.

American Fid. Co. v. Bleakley, 157 Iowa 442; *New York L. Ins. Co. v. Cravens*, 178 U. S. 389 (44 L. Ed. 1116). In the last named case, the court said:

"The power of the state over foreign corporations is not less than the power of a state over domestic corporations. No case declares otherwise. We said in *Orient Ins. Co. v. Daggs*, supra: 'That which a state may do with corporations of its own creation, it may do with foreign corporations admitted into the state. This seems to be denied; if not generally, at least as to plaintiff in error. The denial is extreme, and cannot be maintained. The power of a state to impose conditions upon foreign corporations is certainly as extensive as the power over domestic corporations, and is fully explained in *Hooper v. California*, 155 U. S. 648.'"

In *American Fidelity Co. v. Bleakley*, 157 Iowa 442, we said:

"The appellant's claim that the policy in question should issue because of interstate comity cannot be sustained. The state has the undoubted right to say whether foreign corporations shall be permitted to do business here at all, and, if such permission is granted, it may be upon such terms and conditions as the state shall prescribe. And where it is the manifest intention to limit or restrict the powers given to such corporation by its charter, courts have no authority to override such legislation on the ground of comity between the states. Within its power, the state, through its legislature, is supreme, and the court's duty is ended when it determines what the statutory law is."

See, also, *Frick v. Hartford Life Ins. Co.*, 179 Iowa 149.

Nor can an infraction of the Fourteenth Amendment to the Constitution of the United States be said to be involved

in compelling an insurance association to pay the stipulated indemnity to those entitled thereto, even though payment has been made to another not lawfully entitled thereto.

III. Section 1832 of the Code Supplement, 1913, in addition to prescribing conditions on which associations like defendant may transact business in this state, declares that:

"If the auditor of state shall approve the articles and also the by-laws or rules, he shall issue to the society, order or association a permit in writing, authorizing it to transact business within this state for a period of one year from the first day of April of the year of its issue. Societies, orders or associations not organized under the laws of this state, in addition to the requirements of the provisions of Section 1829 of the Code, must also comply with all of the provisions of this chapter, except as to the residence of membership."

Section 1824 of the Code forms a part of this chapter and provides that:

"No fraternal association created or organized under the provisions of this chapter shall issue any certificate of membership to any person under the age of fifteen years, nor over the age of sixty-five years, nor unless the beneficiary under said certificate shall be the husband, wife, relative, legal representative, heir or legatee of such member."

Appellant argues that the former section has no application to the latter, but applies only to the general provisions having reference to foreign companies, and bases its argument largely on the legislative construction. The language quoted, however, is too plain to permit of any doubt; for the requirements are in addition to Section 1829 of the Code, and exact compliance, not with part, but "with all of the provisions of this chapter, except as to the residence of membership." The language could not well be plainer; and, as the subsequent acts of the legislature are not in-

consistent with the exaction of obedience to Section 1824, we have no trouble in reaching the conclusion that foreign associations admitted to do business are bound by Section 1824 of the Code.

IV. One of defendant's by-laws provides for payment of every loss under the certificate to a dependent, and that, "if the designation of beneficiary shall fail, for illegality

4. INSURANCE:
illegal bene-
ficiary: in-
surer as bene-
ficiary.

or otherwise, the benefit shall revert to the Life Benefit Fund." As contended by appellant, the members of such an association, as well as their heirs, are bound by its by-laws, if valid. *Ross v. Modern B. of A.*, 120

Iowa 692; *Boeck v. Modern Woodmen*, 162 Iowa 159; *Roeh v. Business Men's Prot. Assn.*, 164 Iowa 199; *Elliott v. Home Mutual Hail Assn.*, 160 Iowa 105.

Possibly, where there is no provision to the contrary, the indemnity may be made payable to someone other than those defined by a statute. See *Grand Lodge A. O. U. W. v. Cleghorn*, (Tex.) 42 S. W. 1043. Section 1824 of the Code excludes any not named therein, by declaring that:

"No fraternal association created or organized under the provisions of this chapter shall issue any certificate of membership to any person, * * * unless the beneficiary under said certificate shall be the husband, wife, relative, legal representative, heir or legatee of such member."

As no such certificate shall be issued to the beneficiary other than of the classes named, designating a dependent as such, or even the association, would seem to be prohibited. See *Smith v. Supreme Tent, Knights of Maccabees*, 127 Iowa 115, where Section 1824 of the Code was construed in ascertaining whether the beneficiary named in a certificate issued by this same association was entitled to the indemnity promised.

Lillian Ingalls was not connected with the insured otherwise than as a dependent, and therefore her designation

as beneficiary was illegal. It is argued, however, that the company is not liable, for that, under such circumstances, the by-law declares that "the benefit shall revert to the Life Benefit Fund." This is tantamount to naming the association as the beneficiary. The indemnity, under these circumstances, would be distributed to all the members of the association, and be made use of in meeting losses instead of assessments collected. To make the association a beneficiary is quite as inconsistent with the provisions of Section 1824 of the Code as the designation of

6. **INSURANCE:**
indemnity
passing to in-
sured's estate.

a dependent. In this state, the rule has long been established that, in event of some omission or illegality in the designation of a beneficiary, as exacted by the statute, the benefit or indemnity will pass to the estate of the assured. *Schmidt v. Northern Life Assn.*, 112 Iowa 41; *Oliphant v. American Health & Acc. Assn.*, 147 Iowa 656.

In *Boeck v. Modern Woodmen*, supra, the place of the contract only was involved.

V. The defendant, by way of amendment to the amended and substituted answer, pleaded in bar that the heirs of the insured were residents and citizens of Germany, and therefore that the court erred in continuing the cause; that, instead, the action should have been abated. The action was begun March 19, 1914, and this amendment was

6. **ALIENS:**
abatement of
action (?)
or continu-
ance (?)

not filed until September 25, 1917; and the issue is whether, in such a situation, the action should be abated, or should be continued until the termination of hostilities between this country and the empire of Germany. There is no controversy but that the heirs are alien enemies, of a character which precludes prosecution of action in our courts; for they reside in and are citizens of Germany. Though it is often said by the law writers that an alien enemy cannot sue, for that to permit a recovery would strengthen and aid, in

resources, the hostile government, and thereby weaken our own resources, this depends somewhat on other considerations, as place of residence and rights accorded resident alien enemies by our government. The test of the right to sue which generally obtains is residence, rather than nationality; the location of the alien enemy, and not the fact that he is such. See *Wells v. William*, 1 Lord Raym. 282; *Clarke v. Morey*, 10 Johns. (N. Y.) 69, 70; *Porter v. Freudenberg*, 1 K. B. (1915) 857 (Ann. Cas. 1917 C. 215). See, also, an article in the Yale Law Journal of December, 1917, and notes to *Daimler Co. v. Continental Tyre & Rub. Co.*, Ann. Cas. 1917 C. 170, 193. The learning on the subject appears in these cases, and leaves no doubt as to the fact that the heirs of the assured, at least, might not prosecute an action in the courts of this country. It will be observed, however, that the suit was begun about three years before the government of the United States was engaged in war with Germany. The administrator, who was a citizen of this country, undoubtedly acted in a representative capacity, and, in prosecuting the action and in recovering the insurance indemnity, if this happened, necessarily acted in a trust capacity for those ultimately entitled to the proceeds. In this situation, there would seem to be no good reason for postponing the suit; for whatever might be recovered necessarily would lodge in the hands of the administrator. That officer is under the control of the court, and might very well be directed to retain the funds, for distribution after the termination of the war. See *Krachanake v. Acme Mfg. Co.*, 175 N. C. 435 (95 S. E. 851, 852); *Birge-Forbes v. Heye*, 248 Fed. 636.

The object is not to defeat the alien enemy of his right to recover whatever may be owed to him, nor to shield the citizen from the enforcement of his just obligations, but to obviate the deriving of any advantage by the enemy, directly or indirectly, pending hostilities. These reasons have

persuaded many courts to postpone, rather than abate, actions begun before the countries were engaged in war. That such a defense may be either temporary or final, appears from *Schmitz v. Van Der Veen & Co.*, 112 L. T. N. S. (Eng.) 991:

"In the first place, an alien enemy cannot maintain an action in our courts, not because his enemy character constitutes a defense to his claim, but because it deprives him of *locus standi*. He is, while that character lasts, under a temporary disability to sue. Yet the cause of action, if otherwise good, is unaffected. But secondly, in some cases the enemy character does affect the cause of action, as where it is upon an insurance of enemy ships or goods. It being the object of the Crown to destroy the commerce of the enemy, a contract to indemnify him against such loss is or becomes illegal, and there is no cause of action. In such a case, even if the broker, a British subject, sues, and the policy was underwritten before the war, the action still fails, and fails finally, not because the beneficiary is an enemy, but because the cause of action is bad. * * * It is essential to distinguish carefully between these two cases, i. e., that where the cause of action is unexceptionable, but the plaintiff, as an alien enemy, is temporarily and personally incapable of being received as a plaintiff, and that where the cause of action, whoever puts it forward, fails in itself, and fails finally. It cannot be put more clearly than in the words of Lord Ellenborough, in *Flindt v. Waters*, 15 East 260: 'The defense of alien enemy must be accommodated to the nature of the transaction out of which it arises; it may go to the contract itself on which the plaintiff sues, and operate as a perpetual bar; or the objection may, as in a case of this sort, be merely personal in respect to the capacity of the party to sue upon it.'"

Though there are some cases which hold that, where a person, after bringing action, becomes an alien enemy, he

will be barred from further maintaining the action, the better view seems to be that the proceedings will be stayed merely, and not dismissed, unless the action itself ought not to be maintained. The authorities are well reviewed in *Luczycki v. Spanish River Pulp, etc.*, 34 Ont. L. Rep. 549, and the conclusion reached that where, during the action, the plaintiff becomes an alien enemy, the litigation will merely be suspended, because of the temporary incapacity of the plaintiff to go on with the action, and that it will remain in abeyance until the impediment be removed by the close of the war. See note to *Daimler Co. v. Continental Tyre, etc., Co.*, Ann. Cas. 1917 C. 170, at page 207; *Taylor v. Albion Lbr. Co.*, 176 Cal. 347 (168 Pac. 348); *Krachanake v. Acme Mfg. Co.*, supra; *Levine v. Taylor*, 12 Mass. 8; *Bell v. Chapman*, 10 Johns. (N. Y.) 183.

A different view prevailed in *Howes, etc., Co. v. Chester & Co.*, 33 Ga. 89; but the authority of that case is considerably impaired, since it turned out that there was no alien enemy involved. *Texas v. White*, 7 Wall. 700 (19 L. Ed. 227).

As pointed out by Judge Speer, in *Plettenberg, Holthaus & Co. v. Kalmon & Co.*, 241 Fed. 605, the opinion must be regarded as academic. Quoting from Judge Speer:

"With the evolution of law, the courts of the English-speaking peoples exhibit greater magnanimity in affording opportunity of redress to alien enemies. Notwithstanding a ruling of Sir William Scott, afterwards Lord Stowell, made in 1799, to the contrary, the British prize courts of today hear any alien enemy asserting rights under a convention of the Hague Peace Conference. Shall the courts of the United States then, wholly deny a hearing to one not such when he here sought redress, but who has since become an alien enemy? To do this would not, in my judgment, accord with the spirit of our institutions, nor with the spirit of our government, which disclaimed hostilities to

the German people when it proclaimed war in defense of freedom and of a common humanity."

Circuit Judge Buffington, in *Kaiser Wilhelm II.*, 246 Fed. 786, after reviewing the facts of the case, remarked that it called "for the exercise of that range of discretion" peculiar to the court of admiralty, and that this would be—

"An order which will make due provision for, first, giving the German citizen and belligerent an opportunity to litigate his rights, if relations with his country are hereafter resumed; second, providing for adjudging, if the government hereafter so desires, its rights and liabilities, if any, in taking over libeled property of the German subject; third, adjudging hereafter what effect the taking of this ship by the government had on the claim of the British lienor, and the further obligation of the German vessel owner, as between themselves. In following this course, and protecting the unprotected rights of an absent German citizen while this country is at war with the imperial government of its country, we are impelled by three all-sufficient reasons: First, the innate sense of fairness, decency, and justice which respects the rights of an enemy; second, the broad principles of international intercourse, which lead courts and nations that believe in international rights to be the more careful to observe them toward belligerents; and lastly, because the awarding to this German citizen, with whom our country is at war, the careful preservation until times of peace of its rights, is in line with those high ideals of Anglo-Saxon justice which led the British courts years ago, in *Re Boussmaker*, 13 Vesey 71, decided in 1806, to allow the claim of an alien enemy to be proved in time of war, and the dividends held by the British court until peace. Indeed, the fact that our country is now at war with Germany is all the more reason why this court should most scrupulously award to this German citizen those interna-

tional and equitable rights which no fair-minded people ever deny, even to their enemies in times of war."

On principle and authority, then, we reach the conclusion that the court did not err against the appellant in overruling the plea involved, and postponing the further hearing of the cause until the termination of the war. The plaintiff did not appeal; and therefore we have no occasion to decide whether the plaintiff might well have been permitted to go on with the case, and the court retain whatever might be recovered in the hands of the administrator until peace should be restored.—*Affirmed.*

EVANS, PRESTON, and SALINGER, JJ., concur.

SUPPLEMENTAL OPINION.

PER CURIAM.—Appellant suggests, in its petition for rehearing, that the conclusion reached in the opinion destroys the principle of uniformity, as between the members, and the members and the association, but does not explain how this will be brought about, save by citing *Supreme Council of the Royal Arcanum v. Brashears*, 89 Md. 624 (43 Atl. 866). On the trial of that case, the beneficiary named in the certificate of insurance, suing for indemnity stipulated therein, offered in evidence a duly certified copy of Chapter 281 of the Acts of 1895 of the state of Massachusetts, relating to misrepresentation in applications for membership in fraternal beneficiary associations, which read:

"When any certificate is issued to a resident of the commonwealth by any fraternal beneficiary corporation organized under the laws of or admitted to do business in this Commonwealth, no oral or written misrepresentations or warranty made by the assured or in his behalf in the application for such certificate, or in the negotiation of the contract, shall be deemed material or defeat or void the certificate or prevent its attaching, unless such misrepresentation

or warranty is made with actual intent to deceive, or unless the matter misrepresented increased the risk of loss."

The court held that this was admissible, for that a certificate was issued by a Massachusetts corporation, and therefore the statute in question was applicable thereto, even though the act apparently applied only to cases where certificates of membership were issued to residents of Massachusetts, the court saying:

"The mutuality and fraternity which form the basis of mutual benevolent associations and kindred organizations require that all of their members shall be treated alike. It would be fatal to the whole benefit scheme of the Royal Arcanum if, when the case of the beneficiary of a Massachusetts member of the organization were on trial, his or her rights should be measured by a more favorable standard than would be applied to the beneficiary of a Maryland member. The regulations contained in the constitution and by-laws of the society contemplate like treatment of all of its members of the same class, without special favor or advantage to any, under a similar state of facts."

Otherwise, a certificate of insurance valid in Massachusetts must have been adjudged invalid in Maryland, and in Pennsylvania. *Fidelity Mut. Life Assn. v. Ficklin*, 74 Md. 172 (21 Atl. 680). It is to be noted, however, that there was no statute in Maryland interfering with this conclusion. In Missouri, a statute provided that, in suits on insurance contracts, suicide by the insured shall not constitute a defense, unless contemplated when application therefor was made, notwithstanding that a stipulation in the policy to the contrary uniformly has been held applicable to suits on certificates issued by foreign fraternal associations. *Schmidt v. Supreme Court U. O. of F.*, 228 Mo. 675 (129 S. W. 653). This, of necessity, allows a defense in one state not available in another, and thereby seems to tolerate the inequality denounced in the Maryland decision, though

doubtless on the ground that the foreign association, in doing business in Missouri, undertook to conform to its laws. Appellant also relies on *Supreme Council of Royal Arcanum v. Green*, 237 U. S. 531, where the power of fraternal beneficiary associations to increase the assessments required to be paid was involved. Although the Supreme Judicial Court of Massachusetts had ruled, in *Reynolds v. Supreme Council of Royal Arcanum*, 192 Mass. 150, that the increase of assessments was within the power of the company, the Court of Appeals of New York, in *Green v. Supreme Council of Royal Arcanum*, 206 N. Y. 591, ruled otherwise; and in this last case, on appeal to the Supreme Court of the United States, 237 U. S. 531, Chief Justice White, in the course of his opinion, observed that:

"An assessment which was one thing in one state and another in another, and a fund which was distributed by one rule in one state and by a different rule somewhere else, would, in practical effect, amount to no assessment, and no substantial sum to be distributed. It was doubtless not only a recognition of the inherent unsoundness of the proposition here relied upon, but the manifest impossibility of its enforcement, which has led courts of last resort of so many states, in passing on questions involving the general authority of fraternal associations, and their duties as to subjects of a general character concerning all their members, to recognize the charter of the corporation and the laws of the state under which it was granted, as the test and measure to be applied."

The power to fix and collect assessments is fundamental in the organization of fraternal mutual insurance companies, and the court ruled that the New York court, in not giving to the charter, as amended, and the laws of Massachusetts, as announced by its Supreme Judicial Court, full effect, disregarded the full faith and credit clause of the Constitution. The soundness of the decision is beyond

question. Any other ruling would impinge upon the principle of mutuality between members which is basic in the organization of all fraternal associations, and would destroy that equality as between members which is essential to their continued existence. The trouble with appellant's contention lies in the assumption that any question touched in the cases cited is involved in ascertaining who is entitled to the stipulated indemnity. It is of no concern to other members whether, upon the death of a member, the benefit is paid to a beneficiary of one class or another. Nor is this material to the association. Its sole concern is that it reach the person entitled thereto. The different classes from whom the member may choose are designated by statute, but he alone may select from these; and his choice, or any change therein, cannot well affect the relations between him and other members nor those between the members and the association. For these reasons, it cannot well be said that the naming of specified beneficiaries is essential to the organization of a mutual benefit association, nor that the power to define who shall be entitled to benefits rests solely with the society, or with statutes of the state where organized. The case on which appellants seem to rely, *United Order of the Golden Cross v. Merrick*, 165 Mass. 421 (43 N. E. 127), construes certain statutes of Massachusetts, which declare, in substance, that a foreign fraternal association may do business in the state "by conforming in other respects to the foregoing provisions," among which was one declaring that "the corporation may also provide in its by-laws for the payment, from time to time, of a fixed sum by each member to be paid to the beneficiaries of the deceased member in such amount and manner as shall be fixed by said by-laws and written in the benefit certificate issued to said member, and payable to the husband, wife, child, relatives of, or persons dependent upon, such member." The court held that, inasmuch as this did not expressly prohibit naming a

beneficiary other than of one of these classes, such beneficiary named in a certificate of an association organized in Tennessee, where there are no statutory restrictions, was entitled to the benefits. This seems in conformity with other decisions. See cases collected in 1 Bacon on Benefit Societies 561. Also, see *Gruber v. Grand Lodge A. O. U. W.*, 79 Minn. 59 (81 N. W. 743). Our statute prohibits the issuance of a certificate of insurance when a beneficiary other than one of the classes named is designated, and therein differs from that of Massachusetts, and possibly other states. It was competent for the lawmakers to prescribe under what conditions foreign mutual associations might engage in business in this state. *Scottish Union & Nat. Ins. Co. v. Herriott*, 109 Iowa 606; *New York Life Ins. Co. v. Cravens*, 178 U. S. 389. This rule was recognized in *Dworak v. Supreme Lodge, W. B. Frat. Assn.*, 101 Neb. 297 (163 N. W. 471). The defendant in that case was organized under the laws of this state, but the court held that the statute of Nebraska specifying the classes from which the beneficiaries must be chosen, controlled, saying:

"The statutory provision limiting and defining the classes of persons to whom death benefits should be paid became as much a part of the contract of insurance as if it had been written therein, and it declared the policy of the state with respect to such contracts."

In referring to *Supreme Council Royal Arcanum v. Green*, supra, as being relied on by appellant, the court observed that:

"The question in this case is so different that the opinion in that case does not control its decision. The question there involved the relation existing between the corporation and its members, and between the members themselves, with respect to uniformity of assessments in different states. Here, we are not concerned with such questions, since such

relations have all been terminated by the maturity of the contract."

In *Dennis v. Modern B. of A.*, 119 Mo. App. 210 (95 S. W. 967), the court held that, "where a society may depend for its power to do business on the statutes of two states, one where it is organized, and the other wherein it is permitted to do business as a foreign corporation, the statute of the latter will control as to who can become beneficiaries in cases originating in the latter," the court observing that, "since no foreign association could do business here without the authority of this state, it must bring itself within the terms of such authority. That is to say, it must bring itself within the description of the local associations in this state, which means they must have for their object the benefit of the same class or classes of beneficiaries that are named in our statutes."

In *Baltzell v. Modern W. of A.*, 98 Mo. App. 153 (71 S. W. 1071), and *Herzberg v. Modern B. of A.*, 110 Mo. App. 328 (85 S. W. 986), the legal representatives of the assured were named as beneficiaries; and, after noting that legal representatives might not be named as beneficiaries under the Missouri statute, though this might be done in the state where organized, the court ruled that such representatives might not recover. In *Wilson v. Supreme Conclave Imp. Ord. of Heptasophs*, 174 N. C. 628 (94 S. E. 443), it was held that such a certificate, when a North Carolina contract, was governed by the statute of that state, although the company was organized in Maryland. In *Supreme Court I. O. of F. v. Fisher*, 172 Ill. App. 454 after reviewing the decisions of that state, the court reached the conclusion that a statute of that state, defining the classes from which beneficiaries were to be chosen, controlled, rather than the certificate of a foreign association. We have discovered no decision to the contrary, nor has any been cited. The certificate considered in *Belknap v. Johnston*, 114 Iowa 265, was

held to be an Illinois contract, and therefore to be construed according to the laws of that state. Enough has been said to dispose of the contention that the full faith and credit clause of the Constitution is being violated. To enforce a statute of this state and uphold its policy will not be construed to evidence an indisposition to accord to those of another state full faith and credit. Our offense, if it be such, lies in holding that the controversy is ruled by the Iowa, rather than the Michigan, statute.

The association, organized in the state of Michigan, upon being permitted to engage in business in this state, undertook to do so in accordance with its laws. It might have proceeded without issuing a certificate of insurance with indemnity payable to a beneficiary of a class not sanctioned in this state, though allowed under the laws of Michigan. Other classes from which to choose were common to the statutes of both states; and surely, in holding that such an association, after undertaking to comply with the requirements of this state as a condition to engaging in business therein, may be compelled to perform what it has undertaken, we do not ignore the constitutional requirement that full faith and credit be accorded the public acts of Michigan, but rather, exact that compliance with the laws and policy of this state which defendant had promised to carry out upon being permitted to engage in business in Iowa. The ruling does not draw the statutes of Michigan into question. The opinion is adhered to, and the petition for rehearing overruled.

WEAVER, C. J., LADD, EVANS, PRESTON, and SALINGER,
JJ., concur.

CAROLINE WENDLAND, Appellant, v. HARRY BERG et al.,
Appellees.

PRINCIPAL AND AGENT: Liability of Agent—Nonfeasance. An
1 agent is not personally liable to a third person for mere non-
feasance.

PRINCIPAL AND AGENT: Liability of Agent—Rental of De-
2 fective Premises. Agents who rented real property to a tenant
were not liable for an accident resulting from the giving away
of a filled well, where, although they knew that the well had
been filled, they knew nothing which would cause them to
believe there was any danger, and where there was no duty of
inspecting the same, even as between them and their principal.

Appeal from Scott District Court.—M. F. DONEGAN, Judge.

OCTOBER 25, 1919.

REHEARING DENIED JANUARY 20, 1920.

ACTION for damages for personal injuries sustained by
plaintiff as a result of falling into a hidden excavation up-
on the premises occupied by plaintiff as tenant. At the
close of the evidence, there was a directed verdict for the
defendants, and the plaintiff appeals.—*Affirmed.*

Andrew L. Chozem and M. V. Gannon, for appellant.

Albert W. Hamann, for appellees.

EVANS, J.—The plaintiff was a tenant of certain resi-
dence premises in Davenport. The owner was Margaret
Harrington, nonresident of the city.

The defendants were related to such owner, and acted
as her agents in the renting of said premises and in collect-
ing the rents therefrom. The plaintiff originally rented
the premises from a Mrs. William Harrington, another rela-
tive of the owner's, and made the initial payment of rent
to her. Thereafter, she paid all the rent to the defendants.
After she had been in the occupancy of the premises about
one year, she suffered a remarkable accident. The ground

gave way under her feet, and she fell into an excavation, 14 feet deep. She claims damages for her injuries from these defendants on the following grounds: (1) That the defendants were in the occupancy of the premises; (2) that they placed the plaintiff in occupancy thereof as tenant, and negligently failed to inform her of the hidden excavation, although they themselves had knowledge thereof.

As to the first ground, it is enough to say that defendants were not in occupancy of the premises in any other sense than that they acted as agents for the owner in reference thereto.

1. PRINCIPAL AND
AGENT: liability of agent:
non-feasance.

It appears from the evidence that there had formerly been an old well upon these premises, which was not in use. In the year 1913, the then tenant of the premises obtained permission to fill it up, and did so. It was filled level with the ground, and the place thereof soon became grass-grown, and a part of the lawn. There was nothing on the surface to indicate any peril of any kind. The defendants knew of the existence of the old well, and knew that it had been filled up. They knew nothing which would cause them to believe that any danger was covered thereunder. The accident to the plaintiff happened about four years after the filling of the well. The record offers no explanation of the cause of the hidden excavation, other than the inference that there must have been a process of settling, which caused the excavation into which the surface finally fell.

The evidence discloses no wrongful act on the part of the defendants in an affirmative sense. There was no misfeasance. If they can be charged with negligence, it must be because they failed to perform some duty owed by them to the plaintiff.

A defendant may not plead agency in defense of his wrongful act, to the injury of another. Even an agent may be held personally liable for wrongful acts of misfeasance

committed by him. But when a charge of negligence against an agent is based upon mere nonfeasance, quite a different question is presented. Negligence by nonfeasance can occur only by failure to perform some duty owed to the injured party. It is the general rule, recognized in this state, that an agent is not personally liable to a third party for mere nonfeasance. *Williams v. Dean*, 134 Iowa 216; *Minnis v. Younker Bros.*, (Iowa) 118 N. W. 532 (not officially reported).

In this case, the defendants did not know that any danger was lurking at the place in question. The evidence discloses nothing which imposed upon them the duty of inspection and discovery, even as between them and their principal. If they owed no such duty to their principal, they owed no more to the tenant of the principal. The tenant knew them as agents, and nothing more, and presumably knew that their duties as to the premises were limited by their obligations to the principal. The motion for a directed verdict was properly sustained, and judgment is—*Affirmed*.

LADD, C. J., PRESTON and SALINGER, JJ., concur.

WESTERN FRUIT & CANDY COMPANY et al., Appellants, v.
HARRY J. MCFARLAND et al., Appellees.

INJUNCTION: Bond—Dismissal of Suit. In an action to vacate
1 a judgment charged to have been wrongfully obtained, where
the injunctive relief asked is merely auxiliary and incidental,
the dismissal of the suit is not, in an action on the injunction
bond, an adjudication that the injunction should not have been
granted, although it would have been such an adjudication, had
the suit been solely for injunctive relief.

INJUNCTION: Bond—Liability for Costs. It is only under bonds
2 executed under the general injunction statute, Secs. 4354 to

4376, inclusive, Code, 1897, that recovery for expenses in dissolving the injunction has no limit save what is reasonably expended for that purpose; and in a proceeding under Secs. 4097 to 4099, inclusive, Code, 1897, the liability is restricted to the payment of any penalty assessed, and there is no liability on the part of defendants for expenses in dissolving the injunction.

APPEAL AND ERROR: Reversal—Nominal Damages. The Supreme Court will not reverse for refusal of alleged purely nominal damages; but that rule does not avail where it is held, in a case where a verdict was directed, that, if the obligee of an injunction bond was entitled to recover anything, the jury might have allowed a substantial sum.

INJUNCTION: Bond—Premature Suit. Where an injunction bond was given in a suit to vacate a judgment wherein auxiliary injunctive relief was sought, and the said action was dismissed, and the main suit and an application therein for an injunction were pending at the time suit was brought on the bond given in the auxiliary proceedings, the suit on that bond was prematurely brought; as, until the main case was decided, it could not be adjudged that the injunction was wrongful in its inception.

APPEAL AND ERROR: Reversal—Directed Verdict. Even if a motion for a directed verdict was assigned on untenable grounds, and sustained by the court on inadequate grounds, yet, if the direction of the verdict was right under the law, the Supreme Court will not reverse the same.

Appeal from Scott District Court.—A. P. BARKER, Judge.

OCTOBER 2, 1919.

REHEARING DENIED JANUARY 20, 1920.

ACTION to recover damages for alleged breach of an injunction bond. Directed verdict for defendants, and plaintiffs appeal.—*Affirmed.*

Sharon, Harrison & McSwiggen and *John C. Higgins*, for appellants.

Isaac Petersberger, for appellees.

SALLINGER, J.—I. Labor quite out of proportion to what is justly demanded by the case has been entailed upon us by the manner of presentation. Had there been a studied attempt to make it as difficult as possible to ascertain what the record presents for review, the difficulty could not have been greater. We gather, however, that the appeal involves this: Appellants obtained a judgment against appellees. They later instituted an independent suit in equity to vacate said judgment, and, as auxiliary relief, prayed a temporary injunction. Such injunction was granted, and the bond involved in this appeal was thereupon and therefore executed. Later, appellants moved to dissolve the injunction. This motion was bottomed mainly on the claim that the injunction in question was rightly to be had only in the suit in which the judgment sought to be vacated had been entered, and could not rightfully be granted in the said independent suit in equity. This motion was argued, submitted, and taken under advisement, but has never been ruled on. Still later, said independent suit to vacate, and in which the bond in suit was ordered, was dismissed by appellees without prejudice, and an order of dismissal was entered by the court. Neither the motion to dissolve or the dismissal by the appellees or the order of dismissal are exhibited in the record. But it appears by an amendment to abstract, as to which no certification has been sought, that the dismissal was filed "so it could be refiled in the original action, not yet determined." Like application for injunctive relief was made in the original suit on March 24, 1916. While dismissal was filed in the independent suit in equity four days earlier than March 24, 1916, this was in vacation. No order of dismissal was then entered, and no judicial action taken on the dismissal until May 16, 1916. The ultimate result is that the same injunctive relief which was sought in the independent suit in equity was also sought in the original suit, after the filing of dismissal

in the independent suit, but before any dismissal was actually effected. It appears further that "the order of dismissal without prejudice has the O. K. of appellant's counsel now appearing herein." While the argument of counsel goes beyond that, and asserts that appellees have finally prevailed, and the judgment has been vacated, the record does not show this state of facts. We are not advised competently what has finally been done with the application to vacate, or with reference to a temporary injunction in aid of such application. The most the record justifies us in saying is that the application to vacate judgment and one for a temporary injunction have been refiled in the original suit, and that both the main suit and the injunction are pending litigation.

Appellants brought suit on said injunction bond, filed in the dismissed equity suit. They seek therein to recover alleged expenses, including attorney fees incurred in said attempt to dissolve said injunction. The trial court directed a verdict, denying the recovery sought. Hence this appeal.

II. There are two error points. In effect, they amount to but one. The appellants contend the trial court erred in that it refused to hold: (1) That the dismissal of the suit to vacate judgment was equivalent to

1. **INJUNCTION:** a formal dissolution of the temporary in-
bond: dis- junction issued in said suit; (2) that the
missal of suit.

dismissal was equivalent to an adjudication that the injunction was improperly sued out; and therefore erred in ruling that appellants could not recover their necessary expenses, incurred in moving to dissolve said injunction. For present purposes, we too will assume that the trial court so held, and therefore directed verdict, and inquire into whether such action can be sustained. A dictum in *Apollinaris Co. v. Venable*, 136 N. Y. 46 (32 N. E. 555), holds that such dismissal is equivalent to such dis-

solution. In *Palmer v. Foley*, 71 N. Y. 106, there is an argumentative intimation to the effect that some cases come close to supporting said dictum; but it is added that the rule stated therein is the law only where the discontinuance is not matter of agreement between the parties. This is not authority for the appellants, because, in the case at bar, the dismissal was O. K'd by counsel for appellants, and in that sense, the dismissal and discontinuance was a matter of agreement; though, under our statute, no agreement was necessary to enable a party to dismiss without prejudice. All applicable that is decided in *Findlay v. Carson*, 97 Iowa 537, is that, even in a case where injunction is not the sole relief sought, dismissal of an original injunction suit has probative value, and may make a prima-facie case that the injunction was wrongfully issued. Passing these, it is to be admitted that *Nielsen v. City of Albert Lea*, 87 Minn. 285 (91 N. W. 1113), *Pacific M. Steamship Co. v. Toel*, 85 N. Y. 646, and *Tullock v. Mulvane*, 184 U. S. 497 (22 Sup. Ct. Rep. 372, at 377), squarely hold that the dismissals in those cases were equivalent to an actual dissolution of the injunction. The *Tullock* case rules further that the dismissal there amounted to a final decision, which was available in suit on the injunction bond as a basis for claiming that the injunction ought not to have been granted. But, in each of these cases, the sole relief sought was an injunction. They were cases of which it might be said, as was done in *Colby v. Meservey*, 85 Iowa 555, that, if the allegations as to and the prayer for injunction were stricken from the petition, no case would be left in existence. In the case at bar, that is not the situation. If we assumed that the petition filed by appellees had allegations as a basis for obtaining a temporary injunction, and a prayer therefor, yet, if all these had been stricken out, a case would have remained. The case was an application to vacate a judgment charged to have been wrongfully obtained; the relief

by way of injunction was merely auxiliary and incidental. If all assumed allegations in the pleadings concerning an injunction and prayer therefor had been eliminated, the main case, an application to vacate a judgment, would have remained. Whatever, then, may be the rule in cases where obtaining injunction is the suit, we have still to consider what the law is where the injunction is purely incidental and auxiliary to the main suit. In *Colby v. Meserve*, 85 Iowa 555, we said that, "when the injunction is merely auxiliary, expenses incurred in defending the action are not recoverable." In that case, the injunction had been dissolved, but we sustained a refusal to allow the recovery of expenses, because, if all concerning injunction had been eliminated, it would have ended the suit. As said, such elimination would not have ended the suit at bar. We said, in *Chicago, A. & N. R. Co. v. Whitney*, 143 Iowa 506, that where (as here) injunction is not the sole relief demanded, but is merely incidental to the main purpose of the action, then attorney fees are not recoverable in a suit on the bond, though the injunction has been dissolved. It was further said that the rule was to the contrary where injunction is the sole relief sought, and on final hearing a dissolution is ordered. And see *Langworthy v. McKelvey*, 25 Iowa 48, 49, and *Thomas v. McDaneld*, 77 Iowa 299. All that is ruled by *Williams v. Ballinger*, 125 Iowa 410, at 414, is that, where injunction is the only thing sought, and a dissolution is actually had upon motion which is confessed, proper expenditures in procuring such dissolution are recoverable. It is clear then that, even if here the court had found that what was done amounted to an actual dissolution of the injunction, it was still no error to deny the appellants the recovery they sought. Even if the injunction had been actually dissolved, still appellants were not entitled to what they asked, because, here, the injunction was a mere auxiliary in attempting to obtain the main purpose

of the suit. It is a significant side light that the trial court, in taking the motion to dissolve under advisement, stated that it would be considered "in determining the action of the court upon the petition to vacate judgment."

The authorities make clear that the distinction between deciding that the injunction is wrongful and some dissolutions is a substantial one. There may be liability on the bond on judgment upon the merits, though there is no order dissolving the injunction. 22 Cyc. 1029. And see *Langworthy's case*, 25 Iowa 49. A refusal to dissolve is no adjudication that the injunction is rightful if the refusal be not on the merits, but merely a declaration that it is deemed best to pass upon its rightfulness on final hearing of the cause. *Andrews v. Glenville Woolen Co.*, 50 N. Y. 282; *Nielsen v. City of Albert Lea*, 87 Minn. 285 (91 N. W. 1113). On the other hand, if the dissolution is ordered as a punishment for contempt, this does not adjudicate that there is liability for wrongfully having obtained the injunction. *Apollinaris Co. v. Venable*, 136 N. Y. 46 (32 N. E. 555). And a bond to respond to the damages if it be finally decided that plaintiff is not entitled to the injunction is not breached, nor is there final decision that it has been breached, merely because there is an order of discontinuance upon stipulation and a money payment. *Palmer v. Foley*, 71 N. Y. 106. These serve to indicate the basic reasoning upon which said distinction rests. If the suit is for an injunction only, its dismissal makes it impossible that any subsequent decision in the case will rule that the dismissed injunction was rightfully obtained, and, so, that it worked no legal damage. There can be no deciding done in a dismissed suit. But where the injunction is merely auxiliary, it may well happen that, though such injunction was dissolved, the plaintiff prevails in the main case. If he does, surely no damages should be recovered on the bond. If an injunction merely restrains action on a judgment sought to

be vacated, and vacation is had, surely no damages are due. For all that was done was to dissolve what, if left in existence, would merely stop for a time a collection to which there never was a right. In one word, even the *actual* dissolution of a temporary auxiliary injunction affords no evidence that such injunction was wrongfully issued, or that its existence caused damage.

III. But there is no evidence in this record for the claim that the trial court proceeded upon said grounds, and it appears affirmatively that the reasons assigned by the court for its action are other than these.

2. Injunction: One of his reasons the trial judge stated
bond: liability thus:
for costs.

"It seems to me that, as the bond in this case never was intended as an injunction bond under the chapter providing for injunction, but clearly being intended by the parties who gave it to secure the penalties provided under the section cited in the bond, or rather Section 4099, which is probably the one intended to be inserted in the bond, this action will not lie."

What of this holding? True, though a bond may be defective as a statutory bond, because not in the form prescribed by statute, it will, nevertheless, be held valid as a common-law obligation. *Garretson v. Reeder*, 23 Iowa 21; *Sheppard v. Collins*, 12 Iowa 570. True, bonds not demanded by statute may, if volunteered, be in some cases enforced. *Painter v. Gibson*, 88 Iowa 120. But that this is all true, of course, does not work that a bond sanctioned by statute, and complying with statute in form, can be held to be security for a liability which is not assumed in the bond.

The bond in suit undertakes nothing except that the obligors will, "in accordance with the subsequent order of said court, respond to the obligees as provided in Section 4098 of the Code." The trial court was of opinion that, since the action on the bond was bottomed on the general

injunction statutes, it would not lie where the bond is in response to special statutes authorizing an injunction in aid of a suit to vacate or set aside a judgment. The general statutes as to injunctions, and which deal also with motions to dissolve, are found in Sections 4354 to 4376 of the Code of 1897, both inclusive. The special statutes are found in the chapter dealing with proceedings to reverse, vacate, or modify judgments in the trial courts. Code Section 4097 provides that the court may first try and decide upon the grounds to vacate or modify a judgment or order, before trying or deciding upon the validity of the cause of action or defense; Code Section 4098, that the party seeking to vacate or modify a judgment or order may have an injunction suspending proceedings on the whole or part thereof, which shall be granted by the court or a judge thereof upon its being rendered probable, by affidavit or verified petition, or by exhibition of the record, that the party is entitled to the relief asked. Nothing is said in any of these special statutes about making a bond on the issuance of such injunction, but there is no doubt that that is contemplated. Section 4099 of the Code provides the penalty if the plaintiff fail to obtain the vacation. That penalty is that, if the judgment or order is affirmed, and the proceedings have been suspended, an additional judgment shall be rendered against the plaintiff in error for the amount of the costs, together with damages at the discretion of the court, not exceeding 10 per cent on the amount of the judgment affirmed. Construing together all the statutes on the subject of injunction, both general and special, we conclude that it is only in bonds executed under the general injunction statutes that recovery for expenses in dissolving has no limit save what was reasonably expended for that purpose. If we were to hold otherwise, we would give control to general statutes allowing a recovery of whatever was reasonably expended, against special statutes dealing

with suspensions in suits to vacate judgments limiting to allowance in the discretion, and, at all events, to not more than 10 per cent on the amount of the judgment affirmed. If we were to hold that the general statutes are applicable, it could well happen that the reasonable expenditure to dissolve was more than 10 per cent of the amount of the judgment affirmed, and that the full amount could be recovered, although a special statute dealing with the very suit in which damages are urged limits the recovery to 10 per cent of the judgment affirmed. Here is but another case of the special controlling the general. And we are of opinion the trial court rightly held that these appellants were not entitled to the relief demanded, because their suit was one based upon the general injunction statutes, and the relief sought should be denied because of the existence of said special statutes. As said, if this be not so, the defendants, having given a bond, expressly reciting that it was given in pursuance of Section 4098 of the Code, and having thereby obligated themselves to nothing but to assure the payment of any penalty assessed under Section 4099, would be held to respond to a liability beyond what they had undertaken. This they may not be compelled to do. In *Drummond v. Husson*, 14 N. Y. 60, a bond was given obligating to pay the judgment if affirmed. The judgment was not affirmed, because the appeal was dismissed. It was contended that the result was substantially the same to the appellant and respondent as if the judgment had been affirmed, and, therefore, the respondent had the right of action on the undertaking. The court declined to take that view, but held that the event provided for in the bond had not occurred, and that, when an undertaking on the granting of a provisional or temporary injunction is in conformity with the statute, the liability of the sureties was according to those terms.

IV. Another reason stated by the trial judge is that, at most, the appellants were entitled to merely nominal

damages. It is true we will not reverse for a refusal to allow purely nominal damages. But that rule cannot avail the appellees. Under the evidence, if it may be held that the obligees on the bond are entitled to recover anything, a jury might well have allowed a substantial sum. Appellees say it is not clear whether the evidence showing expenditures was addressed to the bond sued on, or to one given when injunction was asked in the original suit. We are fully persuaded the jury could have found the evidence was addressed to the bond in suit.

V. But assume that none of the reasons assigned for directing the verdict are good reasons, and that none of the reasons in the motion asking that verdict be directed are tenable. Why should that matter, if there be, in truth, a valid reason for the direction of the verdict? A motion to have verdict directed is, in one aspect, an objection to having it made possible that the other party shall prevail. It does not differ, in legal effect, from an objection which urges that testimony offered by the opponent ought not to be received. It is settled that, when such objection to testimony is interposed, and the objection is sustained, we cannot interfere on appeal, even if the objection stated is utterly untenable, unless it appears there is no sound reason for excluding the testimony. The underlying reasoning was stated as follows, in the case of *In re Will of Crissick*, 174 Iowa 397, at 416:

"If matter is, in fact, objectionable, and the court excludes it, it does not matter that objection was not more specific, or that none was interposed. The text of an objection becomes material only if the objection is overruled, and error assigned upon such ruling. Then, the appellate court sustains the trial court upon the theory that, if the reason presented on appeal had been disclosed to the trial

3. APPEAL AND
ERROR: reversal:
nominal
damages.

4. INJUNCTION:
bond: premature
suit.

court, the ruling might have been otherwise, and no occasion for appeal have arisen. But where the court sustains an objection, and there are, in fact, good reasons for so doing, there will be no reversal because good reasons or full reasons were not presented below. Where the trial judge rules right, although not argued into it, the right ruling will not be disturbed because it was reached without presentation of the true argument for the ruling."

This was a suit to recover damages on an injunction bond, given to obtain a purely auxiliary temporary injunction. When the motion to direct verdict for the defendants was made, the main case in which said injunction was an auxiliary was pending and undetermined. We have pointed out that this situation invokes the distinction between a dismissal of a suit wholly for the purpose of obtaining an injunction, and suits on bond given to obtain a purely incidental injunction. But such situation does more than to create or define that distinction. The pendency of the main case makes the suit on the bond premature. The appellees had actually refiled their application for auxiliary injunction in the main case. Without reference to that, until the main case was decided it could not be known whether the temporary injunction was wrongful in its inception. Should a party be penalized because there was dissolved an auxiliary injunction obtained in aid of a suit to vacate a judgment if, on final hearing, that judgment were vacated,—penalized for having for a time prevented the enforcement of a judgment which was at no time rightfully enforceable? When this verdict was directed, it was possible that the hearing on the merits would set aside the judgment which the dissolved temporary injunction stayed for the time. In other words, had the court declined to direct a verdict for the defendants, this would have been tantamount to making it possible for the jury to award damages to the plaintiff for interfering with the enforcement of a

judgment, although, a week later, it might be determined on final hearing that the judgment should cease to exist, because it had been wrongfully obtained. We have, to some extent, pointed out the importance which the cases attach to the possibility of such a result on final hearing. Along the same line is *Fountain v. West*, 68 Iowa 380; *Scott v. Frank*, 121 Iowa 218, 221; and *Palmer v. Foley*, 71 N. Y. 106. In *Bank of Monroe v. Gifford*, 70 Iowa 580, we held that, if defendant concedes he does not intend to do the act enjoined, he thereby concedes that the writ has not damaged him, and that he would not be damaged by its continuance to a final hearing, and that, in such case, he may not recover the expense of a dissolution obtained. This is another way of saying that, if it be finally held or found that the writ was not wrongful, there is no liability on the bond, though there has been a dissolution. This case is approved in *Scott v. Frank*, 121 Iowa 218, at 222, by a holding that, if it finally appears applicant was not entitled to the writ, then damages might be awarded on the bond. This is, once more, a holding that no recovery is due though the injunction is dissolved, if it do finally appear that the injunction was rightful in its inception. In *Lacey v. Davis*, 126 Iowa 675, at 677, we said:

“Undoubtedly, it is the rule that a right of action does not accrue upon a bond given for the issuance of a temporary writ of injunction until the main action has been tried and determined.”

In *Jewel Tea Co. v. Stewart*, 142 Iowa 353, at 355, we held that if, upon final hearing on the merits, the court should find plaintiff was entitled to an injunction at the time it brought its action, such finding would be a defense to an action on the bond for attorney fees although the temporary injunction had been dissolved, and that, therefore, no action can be maintained upon the injunction bond for such fees until the final disposition of the main case, and

that, so long as that case is pending on the merits, a dissolution of the temporary injunction is, therefore, not an adjudication rendering the obligor liable for such fees in a future action upon the injunction bond.

What it all comes to, then, is this: Assume that the motion to direct verdict assigned untenable grounds, and that the reasons stated by the trial court for sustaining that motion are not adequate, yet directing

5. APPEAL AND
ERROR: rever-
sal: directed
verdict.

the verdict was right, under the law as we have set it forth herein. If we reversed, we would set aside a right judgment because we do not agree to the reasons advanced for asking it and granting it. So to do would violate the well-settled law, as stated in the *Crissick* case. We must decline to reverse an action which we are convinced is right, merely because the court acted upon reasons which do not support the rightful action taken. We note that, in the opinion filed by the trial judge, he indicates that the action was, in fact, premature, but that he did not deem the point had been raised in the case, and thought it was not determinative of it. We note, too, appellant concedes that appellees contended below "that the action was premature, and that no action on the bond could be brought because the court had not formally sustained plaintiff's motion to dissolve the injunction, and that the dismissal by the defendants did not amount to a dissolution of the injunction," and note that appellants say, further, that "the answer [which is not in the record] alleged prematurity, and there was issue on defendant's denial." We are of opinion that prematurity is in the case; that verdict was rightly directed because no right of action had accrued, and as well because the relief sought was one not covered by the bond.

We find nothing relevant in *Mengel v. Mengel*, 145 Iowa 737.—*Affirmed.*

LADD, C. J., EVANS and PRESTON, JJ., concur.

CLINTON BRIDGE WORKS, Appellant, v. PAUL N. KINGSLEY
et al., Appellees.

APPEAL AND ERROR: Notice of Appeal—Sufficiency. A notice of
1 appeal is all-sufficient, when it recites the title as in the trial
court, specifies the date of the judgment appealed from, and is
signed by a party in his *individual* name, with undisputed show-
ing, by amended abstract, that such signer was the attorney for
appellant in both the trial and appellate court. (See Sec. 4139,
Code Supp., 1913.)

APPEAL AND ERROR: Notice of Appeal—Irregular Recital. A re-
2 cital in the abstract that the notice of appeal was filed in the
office "*of said court*," instead of "in the office of the clerk of the
court," is a harmless irregularity.

BONDS: Actions—Beneficiary by Reference. A subcontractor who
3 has furnished material to a public contractor may maintain an
action on the performance bond given to *the public corporation*:

1. When the bond *by reference* makes the contract a part thereof.
2. When the contract *by reference* makes certain instructions to bidders a part thereof.
3. When the instructions to bidders require a bond to protect subcontractors.

PRINCIPAL AND SURETY: Liability of Surety—Unnamed Bene-
4 **ficiary.** A subcontractor may maintain an action on the per-
formance bond of a public contractor, when such bond is con-
ditioned "to discharge all lienable claims that may be due to
any person," even though such bond runs only to *the public*
corporation.

BONDS: Actions—Subsequent Bond Affecting Prior Bond. Rights
5 of a subcontractor fully vested under one bond cannot be af-
fected by the giving of a subsequent bond less comprehensive
in its conditions.

Appeal from Story District Court.—R. M. WRIGHT, Judge.

JANUARY 26, 1920.

THE defendant Kingsley contracted with the defend-
ant county to build specified bridges for it. The appellant

Bridge Works furnished Kingsley labor and material used in that work, and Kingsley failed to pay therefor. The defendant Accident Company executed a bond, running nominally to the defendant county. The defendant Indemnity Company is, if liable at all, liable because it is the successor of the company that gave said bond. The appellant seeks to make the Accident Company liable on said bond, because the same undertook to make good the defaults of Kingsley. The trial court ruled that the bond did not create an obligation which the Bridge Works may enforce. The Bridge Works appeals.—*Reversed*.

Bert B. Welty and *E. L. Miller*, for appellant.

E. H. Addison, for appellees.

SALINGER, J.—I. In an amendment to abstract, the appellant sets forth the notice of appeal. Several objections are made thereto by the appellees, and they insist that the appeal must be dismissed for want of jurisdiction. One specification is that the notice fails to identify the case wherein it is given, and to identify the judgment. We

1. **APPEAL AND
ERROR: notice
of appeal:
sufficiency.**

find no merit in the contention. The abstract sets forth that the suit dealt with is one in the district court of Iowa, in and for Story County; it sets forth the full title of the cause, both as to plaintiffs and defendants, and recites that it appeals from a judgment of that court rendered in favor of the named defendants. Where, for any reason, it may not be presumed an appeal was taken from the final judgment, and the record reveals but one other matter from which appeal would lie, it will be held that the appeal is from this later matter. *Gibson v. Iowa Legion of Honor*, 178 Iowa 1156. There can be no reasonable claim that the cause is not sufficiently identified. As to the failure to identify the judgment, the thought of the appellee seems to be that there is such failure because the notice recites that the appeal is from a judgment rendered at the March term,

1917, of said court, with the further statement that it was rendered on the 10th of February, 1917. The thought of appellees is that there can be no March term, 1917, in February, 1917. It is quite evident the notice is but mistaken as to the term. But that is not vital, especially where it is correctly recited on what day of what year the judgment was rendered; and that much is done.

1-a

It is further contended that jurisdiction is lacking because the notice is signed "Bert B. Welty, E. L. Miller," without the addition of the words, "Attorneys for appellant." In fewer words, the point made is that the signature of names as individuals will not constitute a good notice of appeal, even though those individuals happen to be the attorneys for the defeated party who is appealing.

An amendment to the abstract of appellant, which is not challenged, sets out the following recital or certificate:

"That Bert B. Welty and E. L. Miller, who signed the said notice of appeal, were attorneys of record for the appellant in the trial of said cause in the district court, as well as in the Supreme Court of the state of Iowa, as shown by the original notice, petition, and other papers on file in said cause in the office of the clerk of the district court of Story County, Iowa."

The record shows that this recital is true, and, as said, it has not been challenged by amendment or denial. It is no strain to hold, in such circumstances, that the signature made is that of attorneys for appellant, rather than signatures of the individual signers. We are disinclined to hold that our jurisdiction has been defeated because there was failure to add to the signatures the conceded fact that they were made as attorneys for the appellant. Indeed, we think that *Sawyer v. Iowa C. P. A. Assn.*, 177 Iowa 218, at 224, would rule this point, even if said certifi-

cate had not been put before us by said amendment to abstract. In the *Sawyer* case, we hold that mere paucity in recital must be met by amendment, and cannot be relied upon to defeat the appellate jurisdiction; that nothing but recitals affirmatively showing want of jurisdiction will suffice to defeat it; that the statute which requires the challenge of jurisdiction to be made in a stated manner and in stated time has for its main object that the appellant may more fully set forth the record as to jurisdictional facts, if that can be done. In this case, there was no affirmative statement that the notice of appeal was not signed by the attorneys for the appellant: the most that appeared before the abstract was amended is a failure to show that Welty and Miller, whose names were signed to the notice, had signed it as attorneys. In other words, while it might be true that they signed in their individual capacity, the face of the record did not show that they so signed, and that the most that can be said is that there was a failure to show affirmatively that the men who signed, though they were the attorneys for the appellant, had signed as such attorneys,—a failure to add the descriptive words "Attorneys for appellant." As we view it, this brings the case squarely within the rule of the *Sawyer* case.

1-b

It is suggested (it can hardly be said to be asserted, the jurisdiction fails because the abstract recites merely that the notice of appeal was filed in the office "of said court." Section 4115 of the Code of 1897

2. APPEAL AND
ERROR: notice
of appeal:
irregular re-
cital.

provides the notice shall be filed "in the office of the clerk of the court." Counsel for appellee say that Jones, Iowa Supreme Court Practice, 45, 46, supports such attack

as is here suggested. It is, however, finally conceded that, probably, this exhibits a mere irregularity, and we so hold.

II. The pleadings of the plaintiff make the claim that

the bonds executed by defendant Surety Company undertook to assure the faithful performance of the contract which Kingsley had made with the county;

3. BONDS: actions: that the bonds make this contract a part of the bonds; and that the contract so included in turn includes the instructions to bidders and the 1914 standard specifications of the State Highway Commission. By sustaining demurrer to these pleadings, the trial court held that, because the bond ran to the county, and did not in terms name subcontractors who furnished Kingsley with material to carry out the contract, therefore the plaintiff, who was such materialman or subcontractor, could not recover on the bond.

The defendant Accident Company executed two bonds. In terms, neither bond runs in favor of anyone except Story County and its board of supervisors and representatives. The first bond was signed on the 17th of March, 1915, and its obligation is this:

"The condition of this obligation is such that whereas the above-bounden Paul N. Kingsley as principal did on the 6th day of February, 1915, enter into a written contract with the board of supervisors of Story County, Iowa, to construct concrete culverts and bridges and one steel bridge, copy of which contract together with all of its terms, covenants, conditions and stipulations is incorporated herein and made a part hereof as fully and amply as if said contract was recited at length herein—now, therefore, if the said Paul N. Kingsley as principal shall in all respects fulfill his said contract according to the terms and tenure thereof and shall (in all respects) faithfully discharge the duties and obligations therein assumed then the above obligation is to be void and of no effect otherwise to be and remain in full force and virtue in law."

Beyond all dispute, this bond obligates its maker to make good any breach of the contract made by Kingsley

with the county. The sole question, then, is whether it can fairly be said that Kingsley contracted with the county that he would pay the just claims of anyone who would furnish labor or material to build the bridges which Kingsley had agreed to build. If Kingsley did so contract, then this bond can be asserted by the plaintiff, though the bond runs, in terms, to the county only. Not because plaintiff is named in the bond, but because a condition of the Kingsley contract has been broken, and the bond has undertaken to reimburse for any and every breach of that contract. That is the holding of *Haakinson & Beaty Co. v. McPherson*, 182 Iowa 476. The appellees say that the *Haakinson* case is not applicable, because of difference in facts and in legal questions, and that, moreover, if appellee correctly understands that case, it is not supported by the previous decisions of this court that are cited in appellee's brief. We are of opinion that the *Haakinson* case is applicable here, and are unwilling to hold that it conflicts with any prior decisions in this court. We adhere to its pronouncements. However, the *Haakinson* case is not the only authority that passes upon this point. In *Jordan v. Kavanaugh*, 63 Iowa 152, we held that the rules of construction require that the bond and the other writings shall be read together, in determining the undertaking of the obligors. The whole of the writings must be considered in determining the meaning of any part of it. *Corbett v. Berryhill*, 29 Iowa 157; *United States v. American Surety Co.*, 200 U. S. 197; *Kauffman v. Raeder*, 47 C. C. A. 278. Where the bond is executed and refers to the contract attached to the bond which is declared to be a part of it, and it is the undertaking of the bond that the principal will well and truly comply with the said contract in the time and manner therein provided, all these papers must be read together. 2 Parsons on Contracts 503. The contract of employment should be read with the bond which secures it; and, where the contract

makes the plans and specifications a part thereof, the sureties on the bond are bound by the specifications. 32 Cyc. 73. If the two papers, fairly construed together, show the obligation on part of the contractor to pay the subcontractor for material put into the contract work, then, if the bond is an undertaking to make good any loss suffered by any breach of the contract, the subcontractor may sue and recover on the bond. *Hay v. Hassett*, 174 Iowa 601. If, on fair construction, it is found to be intended, by a bond given to a county or other municipal corporation, that persons not named are intended to be secured by the instrument, then anyone who has sustained an injury by breach of the contract to secure which the bond is given, may, under the statute, maintain suit on the bond. Code Section 3467. And see *Home S. & T. Co. v. District Court*, 121 Iowa 1, at 11. And if the question is in doubt, and the writings are reasonably susceptible of two constructions, the one that is favorable to the obligee, rather than the one favorable to the surety, shall be adopted. *Shorthill v. Aetna Indemnity Co.*, (Iowa) 124 N. W. 613 (not officially reported).

III. Does the contract have an agreement that the material shall be paid by the contractor? If it has, that agreement has been breached, and the plaintiff may recover on the bond. This contract has a general provision that the instructions to bidders and the plans and specifications on file with the auditor by true copy are part of the contract, as fully as though therein set out in full. It has a provision that the contract shall include the proposal, the instructions to bidders, and the 1914 standard specifications of the state highway commission. It has a provision that the plans and specifications are part of and the basis of the contract. The contract stipulates that the board may require the contractor to furnish a list of all persons furnishing labor or materials, and evidence that such per-

sons have been paid in full. In the instructions to bidders, there is a stipulation that the successful bidder must furnish a bond for 50 per cent of the contract price, which shall be drawn to protect the county and any subcontractor.

It may be conceded that the face of the bond contains neither an express nor an implied promise to assure payment by the contractor to materialmen. But we are of opinion that, when the bond which secures the contract of Kingsley, that contract, and the things that the contract makes part of the contract, are read together, as they should be, the proof shows an express promise that any materialman who furnished labor or material in aid of the contract made by Kingsley shall be paid for such labor or material if Kingsley fails to pay therefor. Kingsley failed to pay. So far as the first bond, then, is concerned, the court erred in holding that, on the facts pleaded in the petition, plaintiff had no right to recover on said bond.

Appellees suggest that a promise to make a bond with certain conditions is not available to base a recovery upon a bond which omits to include such conditions, and that the board of supervisors had the right to waive the promise, and to accept a bond which did not conform to the promise. The answer is that there is no occasion to pass upon whether waiver by the board has confronted this plaintiff with a bond on which he may not recover; for we hold that the bond which the board did accept does contain an obligation upon which the plaintiff may recover.

IV. But it is further pleaded that Kingsley was unable to complete his work by contract time, and that he asked and it was deemed necessary to grant him an extension of time longer than 60 days. When the board of supervisors granted this extension of time, it demanded an additional bond from Kingsley, and the defendant accident company, on December 14, 1915, did

4. PRINCIPAL AND SURETY: Liability of surety: unnamed beneficiary.

execute such bond. In all essential respects, the second bond differs from the first in but one particular, and that is that, in this last bond, the obligation is to be bound for any failure of the principal "to discharge lienable claims that may be due to any person, etc., for labor or material." We hold that the second bond, as well as the first, binds the maker of the bond to subcontractors, though they are not named in the bond.

The one question raised by the giving of the second bond is what effect shall be given to the fact that, while the first bond covers any breach of contract by Kingsley, the

last one binds the surety to nothing more than to make good the failure of Kingsley to discharge lienable claims. The record shows the plaintiff had furnished the material it makes claim for before the second

bond was executed. If that be so, then surely the second bond took away no right to indemnity given by the first bond. If the first bond makes the bondsmen liable to this plaintiff, even though it had no lienable claim, a bond later made, which is limited to make good default as to lienable claims only, cannot affect the indemnity given by the earlier contract of suretyship, which is not limited to lienable claims. What is more, on the very day the new bond was given, the surety company stipulated with Kingsley that it was a bondsman on the bond executed earlier; that an extension of time had been granted to complete the work under the contract; and that this extension should work no release from liability under said first-named bond.

In view of the conclusions reached, there is no occasion to determine whether the surety company has estopped itself to deny liability.—*Reversed.*

WEAVER, C. J., EVANS and PRESTON, JJ., concur.

5. BONDS: actions: subsequent bond affecting prior bond.

W. S. CROM, Appellant, v. A. C. HENDERSON, Appellee.

SPECIFIC PERFORMANCE: Fraud—Failure of Title. Fraud and
1 failure to furnish merchantable title as agreed will defeat a
prayer for specific performance.

ATTACHMENT: Truthful Statutory Ground But No Cause of Ac-
2 tion. An attachment on the *truthful* ground that defendant is
a nonresident is, nevertheless, *wrongful*, with resulting right
of action on the bond, when it appears that plaintiff, by reason
of his fraudulent conduct, neither had a cause of action nor
reasonable cause to believe that he had such.

ATTACHMENT: Attorney Fees Covering Defense on Merits. De-
3 fendant in attachment may recover on the bond for attorney
fees for presenting his *entire* defense to plaintiff's action, if
such defense is necessary in order to show that the attachment
was wrongful.

Appeal from Harrison District Court.—J. B. ROCKAFELLOW,
Judge.

JANUARY 26, 1920.

ACTION in equity for the specific performance of a writ-
ten contract. The action was originally brought at law,
and a writ of attachment issued. On hearing, the court
found against the plaintiff and for the defendant upon his
counterclaims. Plaintiff appeals. The opinion states the
facts.—*Affirmed.*

Cochran & Wolfe and *Burke & Welch*, for appellant.

Bolter & Murray and *Roadifer & Roadifer*, for appellee.

GAYNOR, J.—Prior to the happening of the matters
hereinafter referred to, the plaintiff resided in Benton Coun-
ty, Missouri, and the defendant in Harrison County, Iowa.
In February, 1913, the plaintiff owned a farm in Benton
County, Missouri, and the defendant owned a farm in Har-

risson County, Iowa. Some arrangement was entered into by which the plaintiff became the owner of defendant's farm, and the defendant became the owner of plaintiff's farm. It seems that this exchange brought no dissatisfaction to either. That transaction is not directly involved in this suit. Plaintiff continued to reside on his farm in Benton County, Missouri, and the defendant on his farm in Harrison County, Iowa, until after the happening of the matters involved in this suit, and each was in the occupancy of his old farm up to the 7th day of September, 1913. About that time, the plaintiff came to Iowa, and proposed to sell to the defendant certain other lands then owned by him, lying to the east of the land traded to the defendant, and divided from it by "a road" running north and south. Plaintiff claimed that this land of his contained 60 acres. On September 7, 1913, they entered into a written agreement for the sale and purchase of this land for the sum of \$1,200. A contract was drawn and signed, the material parts of which are as follows:

"This agreement, made and entered into this 7th day of September, 1913, by and between Walter S. Crom of Benton County, state of Missouri, party of the first part, and A. C. Henderson, of Harrison County and state of Iowa, party of the second part, witnesseth:

"That for and in consideration of the covenants and agreements hereinafter contained the said party of the first part hereby agrees to sell and by these presents does sell to the said party of the second part, the following described premises situated in Benton County, and in the state of Missouri, to wit: Northwest one quarter of south-east one quarter of southwest one quarter of northeast one quarter Section 26, Township 41, sixty acres more or less all lying east of public highway and containing 60 acres more or less according to the government survey, for the sum of \$1,200 to be paid at the time and manner following:

\$200.00 on the execution and delivery of these presents, receipt of which is hereby acknowledged; the balance to be paid as follows: **\$255.00** on or before the 1st day of Dec. 1915. **\$200.00** on or before the 1st day of Dec. 1916. **\$200.00** on or before the 1st day of Dec. 1917. **\$200.00** on or before the 1st day of Dec. 1918. **\$200.00** on or before the 1st day of Dec. 1919. None of the amount above described shall draw interest until after the first day of Dec. 1913, but thereafter at the rate of six per cent.

"Party of the second part hereby agrees to purchase said premises above described and to pay therefor the sum of **\$1,200.00** at the times and in the manner above set forth."

There are other covenants in this contract to which we may refer later.

It will be noted that, in this contract, the governmental descriptions cover but two acres and a half; that no range is stated, nor is the county in which the land is located given. We take it, however, that both parties understood just where this land lay; that it was the land just across the "road" east of the house occupied by the plaintiff on the land theretofore traded by him to the defendant.

The original petition in this case asked to recover only the first installment provided for in the contract, but it has been so amended as to place the plaintiff in the position of asking for a specific performance of the contract. Upon plaintiff's attention's being called to the description of the land in the written evidence of the contract, an amendment was filed, praying for a reformation of the contract: that is, that the writing be reformed so as to describe the land intended by the parties to be covered by the contract. So, at this time, the plaintiff is praying for a reformation of the written evidence of the contract, and that the contract be enforced as to the land intended to be covered by the contract. We take it that these amendments were made

to meet the suggestions of this court in its opinion filed in this case on a former appeal, found in 182 Iowa 89. Plaintiff's right to have this contract reformed and specifically enforced was challenged by defendant on the ground that the land agreed to be purchased was a tract of 60 acres; that the land described in the contract, as written, covered a tract of only $2\frac{1}{2}$ acres; that, after defendant moved upon the traded land in Benton County, and some time in the month of December, he discovered that this land across the road, involved in this suit, was not of the character represented by the plaintiff at the time the contract was made; that, upon discovering this, he rescinded the contract, and elected to pay the stipulated damages referred to in the contract. He further answers and says that this contract was obtained through fraud and misrepresentation in the following particulars:

(1) That the plaintiff represented the land to contain 60 acres, and that it was reasonably worth \$35 an acre.

(2) That it was good pasture land, and had valuable growing timber on it; that it had no stone or rock on it; that, as soon as the timber was removed, it would be good farm land; that, at the time these representations were made, the defendant was living on his farm in Harrison County, and had no knowledge of the truth of the representations made; that he relied solely upon the statements of the plaintiff; that, in truth and in fact, the land was worth not to exceed \$6.00 an acre, and was not pasture land at all; that there was no timber on the land of any value; that it was rough, covered with stone and rock, and never can be farmed; that it was covered principally with low brush, and was situated in the Ozark Mountains; that plaintiff first represented to the defendant that he owned 50 acres across the east side of the road, but later, claimed he had purchased 10 acres adjoining the 50 acres, and that the 10 acres were in cultivation, and a good, level farm:

that plaintiff resided just across the road from this land for many years, knew its exact condition, and knew that the statements and representations made by him to the defendant were false; that he made them for the purpose of procuring defendant's signature to the contract in question.

The defendant further challenges plaintiff's right, and says that the plaintiff, in the contract, agreed to furnish him a good, merchantable title, and abstract showing good and merchantable title; that he has failed to do this; that, in fact, the plaintiff did not have a good, merchantable title to the land; that the land was incumbered by mortgages which were unsatisfied, and remained unsatisfied of record at the time of the trial.

As said before, the plaintiff commenced this action at law, and, at the time of the commencement, sued out an attachment. This was on the 25th day of February, 1916. Defendant, at the time, was residing on the farm traded for in Benton County, Missouri. Under this attachment, a large sum of money was garnished and held. So the defendant, by way of counterclaim, says that the attachment was wrongfully sued out and levied; that, by the wrongful levy, this money was withheld from him to his damage, measured by the interest on the money so withheld. He bases this on the ground that there was nothing due the plaintiff at the time the attachment was sued out, and that plaintiff had no reasonable ground for believing that anything was due him.

This presents the issues upon which the cause was tried to the court.

It appears that, after the reversal of this case, the cause was transferred to equity, and tried as an equitable action, including defendant's right to recover upon the counterclaim. Upon the trial, the district court found that the plaintiff was not entitled to the relief prayed for, and

that there was nothing due him; dismissed plaintiff's petition; and allowed defendant to recover, on his counterclaim, interest on the money withheld from him under the attachment, on the ground that the attachment was wrongfully sued out, and that suit on the attachment bond by way of counterclaim could be maintained.

Other matters were urged by defendant which need not be here considered.

The court dismissed plaintiff's petition, on the ground that he was not entitled to the relief demanded, or to any relief, and allowed defendant 6 per cent interest on the money withheld under the attachment. From this, plaintiff appeals, and alleges:

(1) That the evidence did not sustain the court's finding; that the finding is in conflict with the evidence.

(2) That the court erred in finding that the contract involved in this suit was obtained through fraud and misrepresentation.

(3) That the court erred, as a matter of law, in finding that the attachment was wrongfully sued out, since it is conceded that, at the time this attachment was sued out, defendant was a nonresident.

It is the claim of the plaintiff that, in all controversies involved in this suit, the finding of the court should have been in favor of plaintiff's contention.

The first proposition involves a question of fact.

As said before, the plaintiff owned quite a large tract of land in Benton County, near the foot of the Ozark Mountains. Some time in February, 1913, he traded some of this land, which will hereafter be known as the land west of the "road," to the defendant for certain land owned by the defendant in Harrison County, Iowa. The record shows that plaintiff had lived for many years on this farm in Benton County; that he knew it well; knew the character of all the land, including this land in controversy; that defend-

ant had made but one visit, prior to September, 1913, and then only to examine the land involved in the trade, and this was in the month of February, 1913, when all the land was covered with snow, several inches deep. Defendant had no occasion to examine the land in controversy at that time, and did not examine it. He certainly never went over it with any view of purchasing it. The representations made to the defendant were made in Harrison County at defendant's home farm, and before defendant moved to Missouri. Plaintiff represented that there were 25 acres of this 60 that were under cultivation, and that the rest of it was good tie timber and saw timber land, and good for pasture; that there was only about half an acre on the hillside that was rocky. The evidence shows that none of the land was good for cultivation, and that there was no tie or saw timber on the land, and that it was not good for pasture, and that it was covered with rocks. As the plaintiff says:

"It was all rocky land,—ledge rock. There is possibly an acre and a half of it, down at the end of a little canyon or draw, that is practically good farm land. The rest is impossible to farm. The timber on it was small brush stuff, second growth; no tie timber or saw logs or anything like it; just brush."

This record discloses that this land was not worth much of anything,—not over \$6.00 or \$7.00 an acre.

We think the record clearly shows that the plaintiff falsely represented the character of this land to the defendant, and that defendant had no knowledge of the char-

acter of the land at the time this contract was made; that he relied upon plaintiff's representations in making the contract. The defendant was right in holding that the

contract was procured by fraud, and ought not to be specifically enforced.

1. SPECIFIC PERFORMANCE:
fraud: failure of title.

Plaintiff represented that he had, and so agreed to give defendant, a good, merchantable title and an abstract showing that the land was free of incumbrance. The record shows that the plaintiff did not have a good, merchantable title to the land, and that the same was incumbered, and that the incumbrance to a certain extent remained upon the land at the time of the trial, and was unsatisfied of record. The court was right in refusing specific performance for this reason, also.

It appears that defendant did not take possession of the land traded on the west side of the road until some time in December, 1913. Within 15 days after he took possession of the traded land, he examined the land in controversy, and notified the plaintiff that he would not take it; that the plaintiff had lied to him, touching the character of the land. So we have to say that, on any theory of plaintiff's contention, the finding of the district court was right, and is amply supported in the evidence. Equity will not require the specific performance of a contract obtained through fraud, nor require one to take the title to property under a contract which provides for a good, merchantable title, unless it is made fairly to appear that the title to the property which it is sought, through equitable proceedings, to force upon him, is a good, merchantable title. The showing made by the plaintiff for a specific performance of the contract so fails in its equitable features, falls so short of what equity demands, before enforcing the contract, that we have no hesitancy in saying that the court was right in dismissing plaintiff's petition for want of equity.

This brings us to a consideration of the rights of the defendant under his claims and counterclaims.

It is contended that, because defendant, at the time the attachment was sued out, was a nonresident of the state, it cannot be said that this attachment was wrongfully sued;

that this is a statutory ground for the attachment. Even though this statutory ground is alleged and does exist, yet there is something more necessary to be alleged, to justify the issuance of the writ.

2. ATTACHMENT: truthful statutory ground but no cause of action.

Section 3880 of the Code of 1897 provides:

"If the plaintiff's demand is founded on contract, the petition must state that *something is due*, and, as nearly as practicable, the amount, which must be more than five dollars in order to authorize an attachment."

An attachment against the property of a nonresident cannot rightfully issue without alleging that there is something due at the time the attachment is sought. To justify the levy, it must appear that there is something due, or reasonable ground for believing there is something due. The right to attach and hold the property of another presupposes the existence of something due, to satisfy which the defendant's property may be rightfully taken and held. To say that one can issue an attachment against the property of a nonresident, when there is nothing due the attaching party, and the attaching party has no reasonable ground for believing there is, is to say that one can wrongfully take the property of a nonresident, give a bond to protect him against the wrongful taking, and then say that the bond furnishes no protection. Before attachment is justified at all, before its issuance can be justified, and before one can justify the attaching of the property of another and withholding it from him under an attachment, it must be alleged that there is something due from the party attached, to the attaching party at the time. He is not mulcted in damages, however, if he had reasonable ground for believing that there is something due. If it affirmatively appear that the plaintiff practiced a fraud in securing the promise to pay on which he founds his right, can he rely on the promise so obtained to justify his action? The district

court affirmatively found that the obligation sued on was founded in fraud, and we affirm its finding on that proposition. We are not doing any violence to reason in saying that the plaintiff is presumed to know that he practiced the fraud which this court affirmatively finds he did practice; for *scienter* is necessary, to make actionable fraud. On such showing, the plaintiff is presumed to know, therefore, that there was nothing due him at the time, because of his fraud in procuring the promise upon which he relied to secure the writ.

The form of the bond provided by statute is that the plaintiff will pay all damages which the defendant may incur by reason of the wrongful suing out of the attachment. The attachment is wrongful if it is made to appear affirmatively that there was nothing due the plaintiff at the time the attachment was sued out, and that he had no reasonable cause for believing that there was anything due. This justifies suit upon the bond; for the statute itself provides that suit may be had on the bond if it be shown that the attachment was wrongfully sued out, and there was no reasonable cause to believe the ground upon which the same was issued to be true.

We are not unmindful of what this court said in *Ames v. Chirurg*, 152 Iowa 278, and cases therein cited, or of the reasoning upon which these cases are based. The bond contemplated is given for the purpose of protecting the defendant against the consequences that flow from the wrongful issuing of the writ, and the writ is just as wrongfully issued when there is nothing due the plaintiff at the time it is issued, as if the other necessary statutory ground for its issuance did not exist. A holding that a party against whom an attachment is issued cannot recover upon the bond, because a fact exists upon which the plaintiff may predicate a claim for an attachment, ought not, in reason or justice, to be so construed as to prevent the defendant from

recovering on the bond which was given to protect against the consequences that flow from the issuing of the attachment, simply because a statutory ground exists, and is alleged and proven, when the basic ground upon which the right to the writ rests does not exist, and he has no reasonable grounds for believing that it does exist: to wit, that he holds an obligation upon which he has a right to proceed against the defendant, and sequester his property for its satisfaction. The very fact that he has no reasonable ground for believing that he has a cause of action against the defendant meets him at the threshold of his proceeding, and challenges his right to avail himself of this drastic remedy. It may be argued, however, that his opponent has a remedy, in that he may sue for abuse of process, or for malicious prosecution, in an independent action; and it may be argued that such cause of action does not arise until the determination of the suit in which the attachment was issued, and the suit in which the process was abused. This is too narrow a construction of the statute. The terms of the bond are broken as soon as the wrongful levy is made and the wrong done. Then the right of action is complete upon the bond. It is the wrongful interference with the defendant's property, under the writ, that gives rise to the cause of action, and that cause of action arises immediately upon the wrongful interference with the property of the defendant. To hold that the defendant cannot proceed by way of counterclaim is to hold that he has no right of action upon the bond, and that the bond affords him no protection. If sent out of court, and required to proceed as for malicious prosecution or abuse of process, that suit could not be upon the bond. If an independent suit could be maintained upon the bond, then clearly the independent suit would rest upon the wrongful suing out of the attachment; and it is the wrongful suing out of the attachment, followed by the levy, that creates

the cause of action that may be pleaded by way of counterclaim upon the bond. If there is no cause of action, there is no ground for the attachment, and if there is no ground for the attachment, it follows logically that the attachment was wrongfully sued out, and, therefore, that there was a wrongful interference with defendant's property by its levy. The burden, however, is on the defendant to show this fact. Though it be made to appear that a ground for the attachment existed, yet, if it is made affirmatively to appear that the plaintiff, in suing out the attachment, has no reasonable grounds for believing that he had a right to the attachment, his action in suing out the writ cannot be justified, and it is, therefore, wrongful. The sequestration of the defendant's property, and the putting of him to expense and damage in defending against the sequestration, is the proximate result of this unjustifiable act. In fact, it occurs to the mind to be a more palpable wrong, and prompted by a baser motive, to sue out an attachment to enforce a claim which the party has no reasonable ground for believing exists, than it would be if the defendant had not been a non-resident.

While it is true that it has been held by this court, and is the law, that one can only recover those attorneys' fees which have been expended in defending against the attachment,

the fact that the defense goes to the merits does not, of itself, defeat the right to attorneys' fees, if the defense made strikes at the very root of the right to the attachment. Where a defense is made on

the counterclaim, based upon the fact that there was nothing due the plaintiff at the time the suit was brought, and that the plaintiff had no reasonable ground for believing that there was anything due, the proof of these two facts sustains the claim that the attachment was wrongfully sued out. The fact that the same proof operates both to defend

3. ATTACHMENT:
attorney fees
covering de-
fense on
merits.

against the suit, and to prove that the attachment was wrongfully sued out, does not militate against the right of the plaintiff to recover attorneys' fees for defending against the attachment. *Whitney & Co. v. Brownell*, 71 Iowa 251.

We take it that *Ames v. Chirurg*, supra, is bottomed on the thought that there was no allegation or proof that the plaintiff had no reasonable grounds to believe that there was nothing due him at the time the suit was instituted. We do not pretend to harmonize what we have said here with all that is said in that case. In so far as that case is inconsistent with our holding here, it is overruled.

Upon the whole record, we think the decree of the district court is right, and it is—*Affirmed*.

WEAVER, C. J., LADD and EVANS, JJ., concur.

MRS. F. A. GREGG, Appellant, v. TOWN OF SPRINGVILLE,
Appellee.

APPEAL AND ERROR: Review—Questions of Fact, Verdicts, and

1 Findings—Directed Verdict—"Most Favorable Construction"

Rule. In considering the question whether the evidence was such that a directed verdict was improper, the Supreme Court will, on appeal, give the evidence the most favorable construction of which it is fairly capable in behalf of the party against whom a verdict has been directed; and if, when thus considered, it appears sufficient, if true, to sustain a verdict in his favor, the ruling will be reversed.

MUNICIPAL CORPORATIONS: Streets and Alleys—Snow and Ice

2 —Non-Liability for Natural Conditions. No legal duty rests up-

on a city to remove snow and ice from a sidewalk, so long as it remains unchanged by the interference of man or other artificial cause; and such duty arises only when, by reason of interference with natural conditions, the coating snow and ice becomes rigid or rounded or uneven, or is made to assume some other form, or to present some other danger than results solely from natural causes.

MUNICIPAL CORPORATIONS: Streets and Alleys—Icy Sidewalks.

- 3 Evidence reviewed, in an action against a town by a pedestrian injured by falling on an icy sidewalk, and held sufficient to go to the jury on the question of the negligence of the town in permitting natural deposits of snow and ice to become rough, rounded, and slanting, so as to make it unsafe for travel.

NEGLIGENCE: Contributory Negligence—Reasonable Care. Plain-

- 4 tiff is not guilty of contributory negligence if, under all the circumstances, it can reasonably be found that he is exercising the reasonable care of an ordinarily prudent person. Direct, affirmative proof of particular acts is not required.

MUNICIPAL CORPORATIONS: Streets and Alleys—Notice as to

- 5 Icy Sidewalk. Evidence reviewed, in an action against a town by a pedestrian injured by a fall on an icy sidewalk, where the rough condition of the ice had existed three weeks or more before the injury, and held sufficient to go to the jury on the question whether, in the reasonable exercise of its duty, the town knew of such condition, or should have discovered and remedied it before the injury.

Appeal from Linn District Court.—F. F. DAWLEY, Judge.

SEPTEMBER 22, 1919.

REHEARING DENIED JANUARY 26, 1920.

ACTION at law to recover damages for personal injury. There was trial to a jury, a directed verdict for defendant, and plaintiff appeals.—*Reversed and remanded.*

Rickel, Dennis & Thompson, for appellant.

Voris & Haas, for appellee.

WEAVER, J.—The plaintiff, a woman about 73 years of age, fell upon a sidewalk in the town of Springville, and thereby received injury to her person. She alleges that such injury was occasioned by the negligence of the defendant in permitting its walk to become obstructed by an accumulation of ice, on which, without fault on her part, she slipped and fell. The defendant denies that it was in any degree

negligent or at fault with respect to the condition of the walk or plaintiff's alleged injury thereon.

The evidence on part of plaintiff tends to show that she was on her way home from church in the evening of January 14, 1917, accompanied by her daughter and another woman. She had received an injury by a fall in her home a year before, but had largely recovered therefrom, and was walking slowly between her companions. Part of the distance, they walked in the middle of the street, to avoid the ice on the walks, until, as they claim, they reached a point where the street traffic was such as to lead them to take to the walk. That there was ice at the place in question, and that plaintiff suddenly slipped upon it and fell, is shown without question. The turning point in the case, so far as it relates to this appeal, is upon the question whether there is any evidence in the record upon which the jury could properly have found that the town was negligent in permitting the walk to be in this condition.

It is an elementary doctrine that, in considering a question of this character on appeal, the court will give to the evidence the most favorable construction of which it is fairly capable in behalf of the party against whom a verdict has been directed, and if, when thus considered, it appears sufficient, if true, to sustain a finding in such party's favor, the order directing a verdict will be held erroneous. Bearing this rule in mind, let us inquire first into the duty of cities and towns with respect to the accumulation of ice upon its public walks. It is well settled by our decisions that:

1. APPEAL AND ERROR: review: questions of fact, verdicts, and findings: directed verdict: "most favorable construction" rule.

"No such duty exists while the snow and ice remain unchanged by the interference of man or other artificial cause. That duty arises only when, by reason of such in-

2. MUNICIPAL
CORPORATIONS:
streets and
alleys: snow
and ice: non-
liability for
natural condi-
tions.

interferences with natural conditions, the snow or ice become rigid or rounded or uneven, or is made to assume some other form or present some other danger than would result solely from natural causes." *Sankey v. Chicago, R. I. & P. R. Co.*, 118 Iowa 39.

In the more recent case of *Tobin v. City of Waterloo*, 131 Iowa 75, 77, the rule is restated in somewhat more specific terms, as follows:

"Ice and snow accumulated on the walk from natural causes, though slippery because of their smooth surface, is not a defect for which the city may be held responsible. It is only when such ice and snow are allowed to remain upon the walk until, by the tramping of pedestrians, freezing and thawing, or other causes, the surface becomes rough, rigid, rounded, or slanting, so that a person in the exercise of ordinary care cannot pass over it without danger of falling, that the defect is such as to render the city liable."

In *Griffin v. City of Marion*, 163 Iowa 435, 444, it was held that municipal liability in such cases "is not limited to the snow and ice becoming rigid, rounded, or uneven, but the city is charged with the duty when the snow and ice is made to assume some other form or present some other danger than it would otherwise solely from natural causes."

In *Templin v. City of Boone*, 127 Iowa 91, the court, speaking by Deemer, J., laid down the rule that "where, by reason of travel or action of the elements, it becomes rounded or worn into ridges, uneven, and irregular, due care on part of the city may demand its removal;" and a verdict against the city was there sustained, where the evidence tended to show "that snow had fallen upon the sidewalk many days prior to the accident, which had not been removed; that people traveling over the walk had made a beaten path through the snow; that it had thawed and frozen until the walk

was in a rough and uneven condition, the center thereof, whereon the path was made, being rounded and sloping toward either edge of the walk; that the water from the melting snow ran down onto the walks and there froze, making the same slippery and unsafe." These cases, selected from many of the same general tenor, sufficiently illustrate the rule applicable under such circumstances.

Turning now to the evidence upon the condition of the walk, we find the following: The plaintiff herself, as perhaps was quite natural under the circumstances, appears to

3. MUNICIPAL
CORPORATIONS:
streets and
alleys: icy
sidewalks.

be unable to speak with any marked definiteness, except that she "fell quick on account of the ice," and that it was smooth there; but other witnesses are quite definite upon this point. Her daughter, who was

present at the time, says:

"It was very icy in the center, and on each side of the walk there was a little snow, but, along toward the center of the walk, the snow had been worn off, and it was just as slick as glass: that is, it was so icy in the center that it was very slippery. It was higher in the middle, and sloped toward both sides. Her feet went right out from underneath. She went quickly from one side. In the middle of the walk where mother fell, the snow and ice was thicker, and kind of sloped off. It sloped east and west, because it was so much thicker in the center."

The thickness of the ice along the ridge or middle of the walk is estimated by one witness at four inches, and by another at an inch and a half. Another witness, who was familiar with the walk and with the use of it by young people for coasting upon sleds, describes its condition and the freezing and thawing of the ice and the effect upon it of its use as a coasting place, and says that:

"After freezing, there wouldn't be any sharp bumps, or anything like that * * * it would be little larger ones,

smoothed off by the sled runners. * * * The ice sloped more towards the street, because the sleds go the other side, and they would sometimes slide sideways."

This witness further says that he was near at hand when plaintiff fell, and rendered her or her friends some assistance. Being asked, on cross-examination, to state the exact condition of the walk at that point, he replied:

"I wouldn't say just exactly where she fell; but, as near as I know where she fell, it was icy and awful slick where they had been sliding. They had slid right across there; it was bumpy, but it was slick. Where they had slid over it with their sleds, it was smooth, but people had tracked it up, and it was filled with the little particles that had been broken off with the sleds, and it was frozen in there." Again, he says: "I don't know hardly how to explain it, only just kind of wavy."

Another says of it: "Where it had thawed, and people had walked over it, and then froze, it was left rough, as I remember it." Another witness describes it "as being quite smooth and icy, full in the center, and sloped toward the edges. Some snow along the edges, but in the center, where she was walking, it was very slick, owing to coasting and sliding in that place by boys."

There is other evidence to the same general effect. It also tends to show that the accumulation of ice was due, in part at least, not to the water and snow falling naturally upon the walk, but to the freezing of water with which the walk was flooded by discharge or overflow from a clogged culvert. It is shown, also, that, from Christmas until January 14th, when plaintiff was hurt, the weather was somewhat variable, though generally below the freezing point, light falls of snow occurring at various times, and the ice in the middle of the walk evidently resulting, to a considerable extent, from the occasional thawing of this snow and its packing or solidification into ice under the feet of

pedestrians and its utilization as a coasting place by children, which was a common practice, no effort being made by the town authorities at any time to remedy or change these conditions.

Without going further into the record, we are quite convinced that it cannot be said, as a matter of law, that there is no evidence of negligence on the part of the town for the consideration of a jury. Stated in other words, if the testimony referred to was believed by the jury (and its credibility was for the jury alone), a verdict finding the defendant chargeable with negligence could not properly be set aside as being without support.

Counsel for appellee place great stress, if not principal reliance, upon the fact that plaintiff herself described the walk or ice on which she fell as "smooth." But this description is by no means inconsistent with the truth of the testimony of other witnesses, who describe the place as "bumpy," "rough," "uneven," "wavy." Ice may be, and usually is, in its very nature smooth, even when rough, irregular, and uneven in its surface lines; and it is also manifestly true that, when such irregularity or unevenness is once produced, the harder and smoother the ice, the more treacherous and dangerous is the walk for use by pedestrians. This fact and its bearing upon the question of negligence by the municipality have been recognized by us in *Rose v. City of Fort Dodge*, 180 Iowa 331, where the city used the same argument which is here advanced for the appellee; and we there held that evidence that an accumulation of ice on a sidewalk is slippery or smooth or slick does not, as a matter of law, show that the condition was solely a climatic one, there being other evidence that the ice was "rough" and "bumpy." In all essential features, the precedent here cited is quite like the case at bar, as is also *Templin v. Boone*, *supra*. The principles applicable to such cases are also well illustrated in *Griffin v. City of Marion*,

163 Iowa 435; *Tobin v. City of Waterloo*, 131 Iowa 75; and very many others, where claims of this nature have been litigated. Very likely, no attempt yet made to state the governing rule has been so complete and perfect as to render its application to every individual case free from doubt. The language employed by this court, speaking by Ladd, J., in the *Tobin* case, *supra*, is perhaps the clearest statement yet accomplished. It is there said that the city becomes chargeable with liability for negligence "when such ice and snow are allowed to remain upon the walk until, by the tramping of pedestrians, freezing and thawing, or other causes, the surface has become rough, rigid, rounded, or slanting, so that a person in the exercise of ordinary care cannot pass over it without danger of falling." In the same connection, as we have before pointed out, we quoted approvingly the rule as expressed in *Sankey v. Chicago, R. I. & P. R. Co.*, 118 Iowa 39, which exempts the city from the charge of negligence only so long as the snow and ice naturally accumulating on the walk "remain unchanged by the interference of man or other artificial cause." That, under the evidence in the present case, the jury could properly find that the snow and ice on the walk had been changed by the interference of man, the tramping of pedestrians, the practice of coasting thereon by children, and the overflow from a clogged culvert, thereby rendering the surface of the ice rough, rounded, and slanting, to a degree making travel over it unsafe, cannot be seriously questioned. Indeed, a special finding to the contrary would be without material support in the record.

Appellee further justifies the directed verdict on the ground that plaintiff is chargeable with contributory negligence as a matter of law, or that she failed to offer evidence from which the jury could find that she used reasonable care for her own safety. We find no merit in this objection. Direct affirmative proof of particular acts consti-

4. NEGLIGENCE:
contributory
negligence:
reasonable care.

tuting due care by the plaintiff was not required. It is sufficient if, upon all the facts and circumstances of the case, the jury could reasonably find that plaintiff was exercising the reasonable care of an ordinarily prudent person (*Gorman v. Minneapolis & St. L. R. Co.*, 78 Iowa 509, 517); and this, we think, may be found from the record. Plaintiff, though somewhat enfeebled, was able to walk, and was in the exercise of an unquestionable right to use the streets and walks of the city in going to and returning from church. Though she knew there was more or less ice on the route, she had the right to assume that the town had exercised reasonable care to keep the walks free from peril arising from negligence in permitting such ice to become changed and converted from its natural condition, by tramping, coasting, or other artificial causes, into other forms and conditions, rendering the way dangerous for public use. It was in the nighttime, when we may presume the condition of the walk was less open and visible than it would be in daylight; she was walking slowly; and it is fairly inferable that she was using as great a degree of care as might reasonably be expected or demanded of the average person under the circumstances. It would be a clear invasion of the province of the jury for the court to assume to dispose of the question as a matter of law.

It is finally urged for the appellant that the evidence was insufficient to justify submitting to the jury the question of notice to the town of the condition of the walk.

There is evidence tending to show that the alleged defective condition of the walk had been quite continuous for a period of three weeks or more; the tramping and coasting upon the ice was daily, and of prolonged

duration, and must have been quite open and visible to the town officers, who may be presumed to be paying some attention to the condition of its streets and walks; and, as

5. MUNICIPAL COR-
PORATIONS:
streets and
alleys: notice
as to icy side-
walk.

we view the record, the alleged defective condition had existed such length of time as to support a finding that, in the reasonable exercise of its duty, the town knew it, or should have discovered and remedied it, before the plaintiff's injury therefrom. It must, therefore, be held that the trial court erred in directing a verdict for defendant.

The judgment below is, therefore, reversed, and cause remanded for a new trial.—*Reversed and remanded.*

LADD, C. J., GAYNOR and STEVENS, JJ., concur.

NINA M. KIPLE, Appellant, v. INCORPORATED TOWN OF CLERMONT, Appellee.

MUNICIPAL CORPORATIONS: Streets and Alleys—Obstructions—Negligence. Evidence reviewed, in an action for damages for personal injuries from wires placed across the street, and held sufficient to go to the jury on the question of the town's negligence in permitting the stretching of wires across a street between telegraph and electric light poles on either side, and the placing of a banner thereon, and in not guarding against the effect of the wind, which caused the poles to lean towards the street and the wires to snap down.

Appeal from Fayette District Court.—A. N. HOBSON, Judge.

OCTOBER 14, 1919.

REHEARING DENIED JANUARY 26, 1920.

ACTION to recover damages for personal injury. Opinion states the case. Directed verdict for the defendant in the court below. Plaintiff appeals.—*Reversed and remanded.*

James Cooney and E. H. Estey, for appellant.

W. W. Comstock and Pickett, Swisher & Farwell, for appellee.

GAYNOR, J.—This action is to recover for personal injuries, caused by coming in contact with wires stretched or strung over and across Union Street in defendant town. The cause was tried to a jury. At the conclusion of plaintiff's evidence, on motion of the defendant, the court instructed the jury to return a verdict for the defendant. Judgment being entered upon the verdict, plaintiff appeals, and the only complaint made in this court is that the court erred in so doing.

Some complaint is made of the manner in which the appellant has presented the case to this court, and it is urged that it has not complied with the rules. However, an amendment to the original argument was filed, which, in our judgment, cures all the defects complained of.

There is but one question: Did the court err in taking the case from the jury? This involves the question whether or not, under the record made by the plaintiff, she was entitled to go to the jury.

The injury occurred shortly after eight o'clock on the 19th day of June, 1917. Plaintiff was riding in a buggy, driving westward on what is known as Union Street. This is one of the principal streets. Main Street runs north and south, and intersects Union Street, and is the main business street. The town has a population of 700 people. On the evening in question, the plaintiff, a young woman 19 years of age, with two companions, was driving in a single buggy down Union Street towards Main Street, and, as she was passing along this street, at a point about 1,000 feet east of Main Street, came in contact with wires stretched across the street. These wires struck plaintiff across the eyes, then caught the buggy top, caused the horse to lunge, and plaintiff was thrown out and injured. Her injuries were severe, but we need not stop to characterize them otherwise.

Several days, four or five, before the happening of this accident, the mayor of the defendant town, assisted by oth-

ers, caused two wires to be stretched across Union Street in the following manner: There is a telephone pole on the south side of this street; on the opposite, or north, side, an electric light pole. This south or telephone pole was about 20 feet high, with a diameter of 5 inches at the top, and about 12 inches at the bottom. It had no guy wires to hold it in position, and was imbedded in the ground about $2\frac{1}{2}$ or 3 feet. Several days prior to the happening of the accident, the mayor, in company with others, stretched these wires from the north pole to the south pole over this street. The street was about 60 feet wide. These wires were placed about two feet apart, the upper wire near the top of the pole. To these wires a banner was attached, advertising a Chautauqua meeting to be held in defendant town. This banner was about 12 feet long and 2 feet wide, and was attached to the upper and lower wires by rings, through which the wires were run. The banner was placed over the middle of the street. In stretching these wires, a jackstrap was used, to get extra pressure, and to pull the wires tight. They were made taut, and as tight as they could be pulled with a jackstrap. When the wires were put up, the bottom wire was in the neighborhood of 15 feet above the surface of the street. Between the time of the accident and the putting up of these wires and this banner, and, we take it, some time before the accident, normally high winds prevailed, and the telephone pole on the south side was found by passers-by to be leaning towards the street. How long it had been so leaning before the accident, does not appear. At the time of the accident, this south or telephone pole had become so loosened from its foundation that it leaned towards the street sufficiently to allow these wires to sink or sag, so that the plaintiff and her vehicle did come in contact with them. The evidence shows that the pole leaned towards and over the street, and the wires were discovered to be in such close

proximity to the surface of the street as to impede travel for three or four hours before the accident.

At the time plaintiff attempted to pass, they had lowered to a point where they struck plaintiff across the face, while riding in an ordinary top buggy. The wires, at the time of the injury, certainly rendered the street unsafe for travel, and this is not questioned.

The liability of the defendant for the accident may be considered from two viewpoints: Did the condition at the time of the injury exist for such a length of time before the injury that the defendant, by the exercise of reasonable care, could have discovered and should have known of the condition, and remedied it before the injury? It was the duty of the town to exercise reasonable care to have and to keep its streets in a reasonably safe condition for travel. It was not reasonably safe for travel at the time of the injury.

If we assume that the town did not know of this condition, or if we assume, as a matter of law, that the condition that caused the injury had not existed for sufficient time to charge the town with notice, we turn then to a consideration of the causes which led up to and produced the condition which rendered the street admittedly unsafe. This involves a consideration of the duty of the city to exercise reasonable care to anticipate and guard against injuries which may reasonably be expected to flow from those things which the city permits to exist on, beside, or over the street, that do not, undisturbed, immediately make the street unsafe, yet may, through the operation of natural laws or uncontrollable natural agencies on the thing permitted, produce conditions that render the street unsafe: that is, whether the city is liable for a failure to exercise reasonable care to guard the traveler on the street from consequences that may reasonably be expected to flow from the operation of the elements on the thing permitted. If the

defendant permitted the original condition to exist, and, in the exercise of reasonable care, should have anticipated the consequences that might and did follow, then it cannot be heard to complain that it did not have notice that consequences reasonably to be expected did follow; for it is held to know that which it could have anticipated by the exercise of reasonable care, and could, by such care, have anticipated and guarded against.

The only evidence in the record as to the length of time that the wires were down before the injury comes from two travelers upon the street, who testified that, three or four hours before the injury, they passed along this street, and found the wires down so low as to obstruct passage. If we should assume that this length of time was not sufficient to charge the city with notice that the wires were down, the question still remains: Should the town be held responsible for the thing that did happen, and this, independent of notice or knowledge of the *then condition*? The defendant had notice and knowledge that these wires were stretched above the street, and just how they were stretched and fastened. It had notice and knowledge, through its mayor, that a banner was attached to these wires, exposed to the action of the wind. These wires had remained attached to these poles, just as we have described, for several days before this accident. They were in plain view of all passersby, and on one of the most traveled thoroughfares of the town, and but a short distance from its business street. Strong winds had blown across the town between the time these wires were so placed and the time of the injury. The banner, at the time of the injury, was shown to be torn into shreds, only the rings remaining upon the wires. The south pole was pulled down towards and over the street, so that the wires attached to it obstructed travel upon the street. That was the condition at the time of the injury. So far as this record shows, the city made no effort to ascertain whether these poles were securely fastened in the

ground to support these wires and this banner. The wires were drawn taut. A banner 12 feet long and 2 feet wide was placed upon them, exposed to the action of the wind. The jury could justly find that the wind, operating upon this banner, had pulled this pole from its mooring, and caused the wires to drop. Can it escape the charge that it disregarded its duty to keep the streets in a reasonably safe condition by the mere fact that the wires might not or even would not have fallen, except for the concurring action of the wind?

The jury could well find that the injury followed as a proximate result of a condition known to the town, and permitted to exist for more than four days before the injury. When it permitted the use of the street, it was bound to take notice and guard against the action of the elements upon the thing which it permitted to exist, and it was for the jury to say whether or not, in the exercise of reasonable care for the safety of the traveler upon the street, in the discharge of that duty which it assumes to keep its streets in a reasonably safe condition, it should have anticipated and guarded against the effect of the action of the elements on the thing which it permitted to exist. The record here presented makes it a pertinent matter for jury inquisition, and the court erred in not submitting it to them.

We have this to suggest. Had the pole fallen without warning on a passer-by, and it could be made reasonably to appear that the fall of the pole was due to the action of the wind normally prevailing in that territory, operating upon the thing which the defendant permitted to exist, the defendant could be held liable on the theory that it consented to the menace which the thing itself created, and defendant permitted to remain over the street, subject to the action of the elements upon it, the effect of which could reasonably be anticipated. As supporting the conclusions herein expressed, see *Bliven v. City of Sioux City*, 85 Iowa

346; *Wheeler v. City of Ft. Dodge*, 131 Iowa 566, and cases therein cited.

On the whole record, we think there was a fair question for the jury, and the court erred in directing a verdict for the defendant. The case is, therefore, reversed and remanded for further proceedings in harmony with this opinion.—*Reversed and remanded.*

LADD, C. J., WEAVER and STEVENS, JJ., concur.

ROBERT LIVINGSTON, Appellant, v. WILLIAM S. CUNNINGHAM et al., Appellees.

HIGHWAYS: Obstructions—Action by Private Citizen. A private citizen may not enjoin the obstruction of a public highway and recover resulting damages when his injury is not different in kind from that suffered by every other citizen. It is not sufficient that he may suffer in a greater degree. So held where the obstruction inconvenienced plaintiff in carrying on his business.

Appeal from Boone District Court.—H. E. FRAY, Judge.

JANUARY 26, 1920.

ACTION by private citizen to enjoin the obstruction of a public highway. Decree dismissing plaintiff's petition. Plaintiff appeals. Opinion states the facts.—*Affirmed.*

O. M. BROCKETT, F. HOLLINGSWORTH, and DYER, JORDAN & DYER, for appellant.

WHITAKER & SNELL and F. W. GANOE, for appellees.

GAYNOR, J.—This action is brought in equity by the appellant, Robert Livingston, a private citizen, to enjoin the continuance of what is claimed by plaintiff to be a public

nuisance, and to recover damages for injury alleged to have been sustained by him by reason of the existence and continuance of the nuisance.

It is claimed by the plaintiff that there is a public highway, regularly established and openly and notoriously used by the general public as such, since 1876, extending in a northerly and easterly direction from the center portion of the town of Moingona, Boone County, Iowa, to the Des Moines River, and thence northerly to the city of Boone in said county, more particularly described as follows:

"Commencing at the north end of the main street of the town or village of Moingona, and runs north across the tracks and right of way of the Chicago & Northwestern Railway Company about two hundred fifty feet west of the depot of said Chicago & Northwestern Railway Company in the said town or village of Moingona, and then extends north about one hundred fifty feet from the tracks of said Chicago & Northwestern Railway Company, thence west and north and northeast, reaching the Des Moines River in a distance of about a quarter of a mile."

It is further claimed that the defendant disputes the existence of said highway, and is asserting some right to the possession thereof against the public, and is attempting to and is excluding the public therefrom, by the erection of fences over and across said highway, and is forcibly attempting to maintain such fences against public travel on said highway.

The plaintiff claims that he, as a resident and citizen of the county, has suffered special injury by the act of the defendant. The injury which he says he will sustain by the obstruction is stated in this way: That plaintiff has been continuously engaged in the business of harvesting and storing and selling ice in the town of Moingona for the last six years; that the ice so harvested and stored is obtained from the Des Moines River,

and that the only convenient access to the river is over this road; that, in the prosecution of said business, it is necessary for him to harvest his supply of ice from said river, and that he is required to transport the same from said river by teams and trucks over this highway; that the distance of the haul is about 40 rods; that, if he is deprived of this, the next nearest route accessible is a public highway to the river, about 4 miles long, and the nearest route over which he might possibly reach said river, as a licensee, is by a private way, about 2 miles. Plaintiff says that he is conducting an ice cream parlor in said town, in which ice cream, lunches, soft drinks, etc., are supplied to customers; that the patrons of his business come by travel past plaintiff's place of business over the highway in dispute above described; that, if defendant is permitted to continue to maintain said fences across said highway, as he threatens to do, and obstruct public travel thereon, and to impede plaintiff's right to passage over the same for the purpose of his business, he will be greatly damaged. His prayer is:

(1) That an easement in favor of the public to the unobstructed use and enjoyment of said highway be quieted as against all adverse claims of the defendant.

(2) That the defendant be ordered, within a suitable time, to remove his fences.

(3) That the defendant be forever enjoined from obstructing said highway by means of fences or otherwise.

(4) That the court ascertain and award to the plaintiff the amount of damages sustained by him by reason of the conduct of the defendant complained of.

Thereafter, F. W. Ganoe, county attorney of Boone County, for and in behalf of the state of Iowa and county of Boone and the public generally, filed a petition of intervention, alleging substantially the same facts alleged by the plaintiff, and praying for the same relief, except as to damages.

The defendant filed answer to the petition and cross-petition, denying the existence of the highway as alleged, and alleging that he (the plaintiff) has not suffered any special damages or any damage other or different than the public suffers or sustains by reason of the closing of the highway, and says further that, if there was ever any legally established highway or easement in the public to use the land in question as a highway across defendant's premises, the same has been abandoned for over 25 years, and that the public officials have never recognized a road or highway at the point claimed. He further says that he and his grantors have been in the continuous, open, and adverse possession of the strip of ground, claimed now as a highway, for more than ten years; that the same is a part of defendant's farm, and plaintiff has paid taxes on the same.

The cause is triable *de novo* here, and the plaintiff must rest his case on the rights asserted by him in his petition, and on the evidence tending to support the same. .

Plaintiff is a private citizen. If plaintiff's contention is true, the highway in question is a public highway. As to the highway itself and as to its use, the plaintiff stands simply as one of the public, and his right to use it depends upon its existence as a public highway. However, at the threshold of this investigation, we are met with the proposition that plaintiff, as a private citizen, cannot maintain this action for and in behalf of the public, and he has not shown that he has suffered any injury different in kind and degree from that suffered by the public generally. The public has had its day in court and has acquiesced in the decision of the district court against it. It is not here complaining of that decision. The plaintiff, therefore, to maintain this action for himself, must show special injury. It is not sufficient that the injury is greater in degree than that suffered by the public. It must appear that the kind of injury sustained is different from that suffered by the general public.

It will be noted that plaintiff lives in the city of Moin-gona; that he is engaged in business there. It is not shown that the obstruction of this highway in any way affects ingress or egress to his place of business, or to any lands owned by him. He bottoms his claim entirely upon the thought that this road, if kept open, will furnish a more convenient route for him to reach the river and secure ice reasonably necessary to the carrying on of his business. That he can reach the river by other routes open to travel, is not disputed. It is the matter of convenience to him that is the gravamen of his complaint. It is not shown that the plaintiff owns any property to which this road affords access. It is not shown that access to any property owned by the plaintiff will be affected by the closing of this road. He has no vested interest in the ice in the Des Moines River. His right to use the ice is a right common to the general public. It is a right that any property owner in the vicinity of the river may assert, with as much assurance of recognition as the plaintiff.

While there are many questions raised in this case, it is disposed of here upon this question, to wit: Plaintiff has failed to show that he has suffered any injury different in kind from that suffered by the general public. The rule generally recognized is that, where the injury complained of is a public injury, and the right violated is a public right, an individual cannot maintain a suit for an injunction unless he suffers a special injury, different in kind from that suffered by the public at large; and the reason for this rule is that, if individuals are permitted to maintain suits for injunctive relief, without having an interest in the subject-matter of the injunction different in kind from that suffered by the public, innumerable suits, involving great expense and annoyance, might be instituted, and in such case a decree in favor of or against one individual would not preclude another. If plaintiff is permitted to maintain this ac-

tion, it follows that any party in the vicinity of this river who desired to use ice from the river, in a private business and for private gain, could compel the public to maintain a road for his private use in his private business. And this on the ground alone that the road sought to be kept open was more convenient for his use in his business, and in securing this kind of property for use in his business, than another road open to his use.

The record discloses that there is a new road open to the river that reaches this town in which plaintiff is carrying on his business; that this road carries directly to the same river from which plaintiff desires to procure ice over the road in question. It is true the distance is a little longer. It is a little more inconvenient, but the closing of this road does not deprive him of access to the river. It only makes it a little more inconvenient for him to reach the river and the ice to be harvested therefrom. This is not sufficient to sustain him in bringing this action as a citizen. The injury is only different in degree, and not in kind, from that suffered by the general public. Plaintiff testifies:

"I conduct a soft drink business, and sell ice cream, candies, and cigars all the year round. There are others that sell soft drinks in town, but not ice cream. If the road is closed, it will put me out of the ice business, and I will have no chance to cool my drinks, and it would be impossible to haul my ice the distance necessary. It would affect my business by keeping away people wanting soft drinks and ice cream who are in picnic and outing parties going to the river. [These statements are but conclusions, not supported by the facts.] I have been in the business there about two years. My family owns another tract of land going to the river. I couldn't haul ice by going through that land, because of a road up across the hill, and there is a creek; but I did cut ice there last winter and could get through."

There is no evidence that plaintiff's egress or ingress is interfered with. This is all the evidence tending to show special interest of the plaintiff in the subject-matter of this road.

It appears that there is no highway over the river at the point where it is claimed that this highway goes to the river. There is one bridge about a mile and a half north on the Lincoln highway. There is another about four miles south. Both of these lead from the river into the town of Moingona.

As said before, the public, represented by the county attorney in the cross-petition, has been defeated on the ground that the road had been abandoned. No appeal was taken by the cross-petitioners. It follows that the plaintiff must recover, if at all, upon the allegations of his own petition. It is immaterial whether there was a public highway or not at the point claimed, it is immaterial whether or not the defendant is obstructing the highway, if the plaintiff has not shown a right to maintain this action against the defendant for the obstruction. It is well settled that a citizen cannot maintain an action in his own right without showing a distinct right in him to bring the action. It is the right to maintain the action as a private citizen that meets him at the threshold of this controversy. This question has been frequently before this court. In *Bryan v. Petty*, 162 Iowa 62, it is said:

"We are confronted at the outset, however, with the contention of the defendant that the plaintiff cannot maintain this action because he has no other or different interest in the maintenance of the same than as one of the general public; that no private right or special interest of property of his is affected by the obstruction complained of. It has frequently been held that an abutting landowner may maintain such an action where the obstruction interferes with the free and convenient use of his abutting property.

The right of the abutting landowner in such a case is a special one, and he is entitled to maintain a civil suit for its protection [citing authority]. We have also held that, if an obstruction to a highway is such as to interfere with the free access to plaintiff's property, or is such as cuts off his place of business from the free course of trade, he may maintain an action for the protection of his special right, even though he is not an abutting owner [citing authority]. The usual showing * * * is that the value of complainant's property and property rights is diminished by the alleged obstruction. On the other hand, we have held that one cannot enjoin the obstruction of a public highway where he suffers only such inconvenience or injury as is the *same in kind* with that of the general public, although it may be greater in degree as to the complainant [citing authorities]."

In *Bradford v. Fultz*, 167 Iowa 686, 701, we said: •

"In the case before us, the obstruction complained of is not such as to prevent the free access of the plaintiff to his property. There was no attempt to show that any property or property right of plaintiff was affected or diminished in value. The obstruction of the highway only compelled plaintiff, like other travelers, to pass over the new road, instead of the old. The one complaint is that the new road is not as good as the old, and can never be made as good. It is much more hilly than the old road."

It was held that this, without more, did not entitle the plaintiff to maintain the action.

In the case at bar, there is no evidence that plaintiff's property or its use was depreciated in value by reason of the obstruction of the road in question. We see nothing in the complaint that is not applicable to all citizens in the town engaged in like or similar business with the plaintiff, who may desire to use ice at some time from this river in their business or in their homes.

We think the plaintiff has not shown a right to maintain this action. As supporting our conclusions, see *Atwood v. Partree*, 56 Conn. 80 (14 Atl. 85), in which it is said:

"But the injury here described cannot be called in any sense special or peculiar, or be said to differ at all in character from that which every member of the public experienced who had occasion to travel this road. The right which every man exercises who travels the highway for highway purposes is a public right. It is common to all; and, although the business of one man may be far more urgent than that of another, his time may be far more valuable, and, consequently, far more injury may result to him from a delay on the road occasioned by obstructions to public travel, still, the character of the injury would seem to be the same in both cases, differing only in degree."

This expresses the general rule, and the rule applicable to the case before us. See, also, *Sohn v. Cambern*, 106 Ind. 302 (6 N. E. 813), in which this language is used:

"The utmost that can be said of the facts stated in the special finding is that they show that the appellee's route to her market town is interfered with by the obstruction placed in the highway; and this is not sufficient to entitle her to maintain this action. The interference with the way leading to a market town is not such a special injury as will entitle an individual citizen to maintain a private action against one who obstructs a public highway."

See *Sunderland v. Martin*, 113 Ind. 411 (15 N. E. 689). In this case it was claimed by the plaintiff that the obstruction to the road interfered with the access to a cemetery in which his dead were buried. The court said:

"So far as the rights of the appellants are affected by the obstruction of the old road, assuming it to have been unlawfully obstructed, the facts averred in the complaint do not show that they sustain or have sustained injury that is

personal or peculiar to them, or different in kind from that sustained by the rest of the community. It is not a case where the obstruction deprives parties of necessary access to or egress from property."

See *Dantzer v. Indianapolis Union R. Co.*, 141 Ind. 604 (39 N. E. 223), an action to recover damages by reason of buildings erected so near to plaintiff's premises as to cut off certain approaches thereto, in which it was said, quoting from *Indiana, B. & W. R. Co. v. Eberle*, 110 Ind. 542:

"His injury and damage, while different in degree, are the same in kind as are those of the community at large. * * * All that is found is that the obstruction forces the travel over the highway nearer his lot, and makes access thereto more difficult and inconvenient. That, however, does not show that the erection of the embankment presents any substantial interference with his right of access over the highway as it was previously enjoyed and used, nor does it show any inconvenience of a kind different from that to which the community at large is subjected. The highway may be more difficult and inconvenient of passage at that point by all who use it, precisely as it is inconvenient as a means of access to the plaintiff's lot. * * * Mere inconvenience or disadvantage, so long as the obstruction complained of does not in some substantial degree impair or deprive the plaintiff of the usual and ordinary means of access to his property, cannot give a right of action."

We need not multiply authorities upon this point. The record in this case fails to show that the plaintiff has sustained damages different in kind from that suffered by every citizen in the town of plaintiff's residence who may desire to reach this river for any purpose. Upon this ground, the judgment of the court dismissing plaintiff's petition must be and is—*Affirmed*.

WEAVER, C. J., LADD, EVANS, and STEVENS, JJ., concur.

In the recent case of *McMillan v. Anderson*, 183 Iowa 873, it was held that 10 gallons of whisky, found in the attic of a private dwelling house, constituted an unusual quantity, and that a presumption arose that same was kept for illegal sale. In that case, the defendant testified that he had the liquor for the personal use of himself and family, and denied keeping the same for illegal sale.

Defendant was at his taxicab stand in front of the West Hotel in Sioux City when he purchased the liquor. Later, Stearns notified him by phone that he was ready to deliver the goods, and defendant went home, unlocked the garage, and Stearns drove in with the liquor. This was about 9 o'clock, and the liquor was purchased between 4 and 5 in the afternoon. Stearns had the liquor with him when defendant purchased it, but it was paid for when delivered at the garage. The quantity of liquor was doubtless very much larger than is usually kept in private dwelling houses or their dependencies in this state. If defendant is to be believed, he had 12 quarts of whisky and several bottles of beer and other liquor on hand at the time the purchase in question was made.

Under all of the circumstances of this case, something more than the denial of the defendant that the liquor was kept for sale, and his statement that it was intended only for private use, was necessary to overcome the statutory presumption. It does not satisfy. He had sufficient liquor on hand at the time of the last purchase to supply the needs of private consumption for a considerable length of time. In our opinion, a permanent injunction should have been granted, as prayed. The decree dismissing the petition will, therefore, be reversed, and cause remanded for decree in harmony herewith.—*Reversed*.

LADD, C. J., WEAVER and GAYNOR, JJ., concur.

L. MATHWIG, Appellee, v. DRAINAGE DISTRICT No. 29, EMMET COUNTY, et al., Appellants.

APPEAL AND ERROR: Appealable Judgment—Action Enjoining
1 and Canceling Drainage Assessments. An order enjoining and canceling drainage assessments is appealable on the part of the drainage district, irrespective of the amount involved. Secs. 4101, 4110, Code, 1897.

DRAINS: "Repairs"—Additional Tile Not New Drain—Classifica-
2 tion of Benefits. The construction of an additional tile of equal size, for the purpose of assisting in carrying off water, parallel with an existing tile which is a part of the drainage system, and as an outlet for several laterals emptying into an open ditch, which was inadequate to carry off the water, was not a new drain, but a "repair," under Sec. 1989-a21, Code Supp., 1913, and could be constructed without the appointment, under Sec. 1989-a12, Code Suppl. Supp., 1915, of commissioners to classify lands for assessment of benefits.

Appeal from Emmet District Court.—N. J. LEE, Judge.

MARCH 20, 1919.

REHEARING DENIED JANUARY 26, 1920.

APPEAL from a decree canceling certain drainage assessments.—*Reversed.*

Morse & Kennedy, for appellants.

E. A. Morling and *C. W. Crim*, for appellee.

STEVENS, J.—The drainage district in question is No. 29, in Emmet County, and consists of a main, open ditch, several miles in length, and numerous laterals. The town of Huntington, which is included within the boundaries of the district, lies north of a public highway near the north line of the district. From the highway referred to, extending in a south and southeasterly direction for approximately 3,953 feet, there is a 12-inch tile, which is a part of the drainage system, which empties into the open ditch. Several laterals

are connected therewith. It appears without dispute in the evidence that large quantities of surface water accumulate in the vicinity of Huntington, which the tile in question, on account of its size, is incapable of discharging into the open ditch, and that, as a result, a large pond covering several acres formed at certain times in the vicinity of the highway south of Huntington. An engineer was appointed by the board of supervisors to examine into the proposition and report a plan for improving the outlet at this point. He recommended that the drain referred to be enlarged by the construction of another tile of equal capacity parallel therewith, and that the intake at the highway be enlarged. The board of supervisors, by resolution, adopted the recommendation of the engineer, and caused notice to be served upon all of the property owners within the district, a large number of whom appeared and filed objections thereto. The board of supervisors levied an assessment equal to 6 per cent of the amount levied upon each tract within the district for the original cost of the improvement. Upon appeal, some of these assessments were canceled, and others reduced.

I. Counsel for appellee have filed a motion to dismiss this appeal, upon the ground that the amount involved is less than \$100, and no certificate was issued, as provided by Code Section 4110. Plaintiff in his pe-

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ERROR: appeal-
able judgment:
action enjoin-
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celling drainage
assessments.

tition asked and was granted injunctive relief, and it is immaterial that the controversy involves less than \$100. *LaGrange v. Skiff*, 171 Iowa 143. The appeal is also proper under Section 4101 of the Code. The motion to dismiss is, therefore, overruled.

II. It is contended by counsel for appellee, and this is the principal question involved upon this appeal, that the proposed improvement is not in the nature of a repair of

2. DRAINS: "repairs;" additional tile not new drain: classification of benefits.

the improvement, but amounts to the construction of a new drain for the benefit of certain lands penetrated thereby, or in the immediate vicinity thereof, and that the land of appellant receives no benefit therefrom, and should not be taxed for any part of the cost thereof.

It appears from the evidence that a considerable part of the district is improperly drained, because the tile is too small; but the evidence is practically undisputed that the line in question is much more inefficient than other parts of the system. Vast quantities of water accumulate in the vicinity of this tile, forming a large pond on the land north thereof.

Section 1989-a21, Code Supplement, 1913, authorizes the board of supervisors, after the completion of a drainage improvement, "to keep the same in repair and for that purpose they may cause the same to be enlarged, re-opened, deepened, widened, straightened or lengthened for a better outlet, and they may change or enlarge the same or cause all or any part thereof to be converted into a closed drain when considered for the best interests of the public rights affected thereby."

The word "outlet," as used in this section, manifestly includes more than the final outlet of the entire system. The tile ditch which it is proposed to enlarge empties into a large open ditch, which forms the outlet for all of the drainage of the district; but the tile in question forms the outlet for the several laterals mentioned, and a large amount of surface water accumulating in the vicinity thereof. That same is inadequate to carry the water is shown without dispute in the record. The effect of the proposed improvement is to enlarge this outlet, and, it seems to us, it clearly comes within the provisions of Section 1989-a21.

The court, in *Kelley v. Drainage Dist.*, 158 Iowa 735.

although Section 1989-a21 was not involved in the questions presented upon that appeal, used the following language, which is here quoted with approval:

"It does not follow, however, that relief by way of supplying an adequate outlet for the existing district was not available under Section 1989-a21 of the Code Supplement, which declares that, 'whenever any levee or drainage district shall have been established and the improvement constructed as in this act provided, the same shall at all times be under the control and supervision of the board of supervisors and it shall be the duty of the board to keep the same in repair and for that purpose they may cause the same to be enlarged, re-opened, deepened, widened, straightened or lengthened for a better outlet, and they may change or enlarge the same or cause all or any part thereof to be converted into a closed drain when considered for the best interests of the public rights affected thereby.' Whether such enlargement of the outlet be effected by widening and deepening the existing ditch or excavating another parallel with it, or whether this be done by removing tile and replacing it by that of larger size, or by laying another tile drain parallel with that already laid, can make no difference; for, in either event, the result is the enlargement of the outlet which is here authorized, and the costs of which are to be assessed as subsequently directed in the same section. It is enough for the purposes of this case, however, that the proceedings were authorized by and in pursuance of the statute first quoted."

To the same effect see *Smith v. Monona-Harrison Drain. Dist.*, 178 Iowa 823.

It is also argued by counsel for appellee that Section 1989-a12 of the Supplemental Supplement, 1915, requires boards of supervisors, where it is sought to repair, enlarge, re-open, or clear obstructions from a ditch, to a point a commission to classify the lands benefited thereby for assess-

ment. The material portion of this statute is as follows: *

"When the levee or drainage district or other improvement herein provided for shall have been located and established as provided for in this act, or when it shall be necessary to cause the same to be repaired, enlarged, re-opened or cleared from any obstruction therein, unless such repairs, re-opening or clearing of obstructions can be paid for as hereinafter provided, the board shall appoint three commissioners, one of whom shall be a competent civil engineer and two of whom shall be resident freeholders of the state not living within the levee or drainage district and not interested therein or in a like question, nor related to any party whose land is affected thereby; and they shall within twenty days after such appointment begin to personally inspect and classify all the lands benefited by the location and construction of such levee or drainage district, or the repairing or re-opening of the same, in tracts of forty acres or less according to the legal or recognized subdivisions in a graduated scale of benefits, to be numbered according to the benefit to be received by the proposed improvement; and they shall make an equitable apportionment of the costs, expenses, costs of construction, fees and damages assessed for the construction of any such improvement, or the repairing or re-opening of the same, and make report thereof in writing to the board of supervisors."

Section 1989-a21 of the 1913 Supplement to the Code, referring to improvement authorized thereby, provides as follows:

"The cost of such repairs or change shall be paid by the board from the drainage fund of said levee or drainage district, or by assessing and levying the cost of such change or repair upon the lands in the same proportion that the original expenses and cost of construction were levied and assessed, * * *

The proceedings in controversy are under and author-

ized by this section, and it was not necessary that commissioners to classify the lands for assessment be appointed. Presumptively, all the lands within the drainage district were assessed for an equitable proportion of the original cost of the improvement, and upon the assumption that the same would be effectual to accomplish its intended purpose; and if it later appeared that it had, in part, failed to do that, the entire district should share in the necessary expense of providing the drainage originally contemplated. *Mayne v. Board of Supervisors*, 178 Iowa 783; *Thielen v. Board of Supervisors*, 179 Iowa 248.

It follows, therefore, that the judgment and decree of the court below, in so far as the same canceled or reduced any of the assessments complained of, is—*Reversed*.

LADD, C. J., EVANS and GAYNOR, JJ., concur.

BURLINGTON RAILWAY & LIGHT COMPANY et al., Appellants,
v. CITY OF BURLINGTON, Appellee.

MUNICIPAL CORPORATIONS: Exempting Public Utility from Assessment. A municipal corporation has no power to relieve a street railway from its statutory duty to construct, reconstruct, and repair the paving or flooring between and adjacent to the rails of its track on public bridges. Irrespective of this holding, ordinances reviewed, and held not to constitute an attempt to grant such exemption.

MUNICIPAL CORPORATIONS: Equitable Considerations Relieving from Assessment. The fact that a public utility company had, for 23 years, annually paid an agreed sum into the city bridge fund toward the maintenance of a bridge on which its tracks were laid, presents no equitable considerations for relieving the company of a statutory assessment for flooring the bridge.

CORPORATIONS: Legislative Control. The legislature has power to impose on a corporation obligations additional to those imposed upon it at the time of its incorporation.

Appeal from Des Moines District Court.—OSCAR HALE,
Judge.

FEBRUARY 16, 1920. .

IN the district court, this was an appeal by the plaintiffs from a special assessment against their street railway for the reconstruction of the flooring between its rails on Cascade Bridge in the city of Burlington. After trial of the appeal on the merits, the district court dismissed the same. From such order, the plaintiffs have appealed.—*Affirmed.*

Seerley & Clark, Tracy & Tracy, Wilson & Jackson, and M. A. Walsh, for appellants.

B. P. Poor, for appellee.

EVANS, J.—I. The plaintiff Burlington Railway & Light Company owns and operates a street railway in the city of Burlington, a city of the first class, under the commission form of government. It was organized in 1895, and became successor to the rights and liabilities of a successive line of predecessor corporations. Some ordinances in evidence refer to some of these predecessors. For convenience of speech, we shall confine our reference to the plaintiff alone, and treat it as though it and its predecessors were one continuing corporation.

The Cascade Bridge is a structure erected by the city of Burlington, about the year 1896, over a deep ravine. Its construction was instrumental in connecting the city proper with a pleasure resort known as Crapo Park. The bridge is 476 feet long, 30 feet wide, and is suspended 97 feet above the bottom of the ravine. After its construction, the city council, by an appropriate ordinance, authorized the plaintiff corporation to extend its railway line over it, and to lay its rails upon it. By an appropriate ordinance in 1919,

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empting public
utility from
assessment.

the city council ordered and caused to be laid new flooring on such bridge. It also caused a special assessment to be levied against the plaintiff, for the cost of laying such flooring between its rails. The plaintiff denies its liability for such assessment, and the question of such liability is what is involved in this appeal.

The broad defense urged by plaintiff is that, by virtue of the ordinance under which the plaintiff was authorized to extend its railway and to lay its rails upon said bridge, it was provided that the plaintiff should pay "\$100 per year for the maintenance and repair of the bridge."

The contention is that this ordinance and the acceptance of its conditions by the plaintiff became, in legal effect, an inviolable grant and contract, and that it is now beyond the power of the city council to impose upon the plaintiff any additional burdens, under the guise of special assessments. A consideration of the defense thus put forth involves the possible consideration of two questions:

(1) Did the city, through its ordinance, purport to enter into such a contract as claimed?

(2) If yea, did it have power to enter into such contract?

If both of these questions must be answered in the affirmative, the plaintiff should prevail. If either must be answered in the negative, the plaintiff must fail.

Section 1 of the ordinance relied upon by plaintiff, and enacted August 5, 1896, was as follows:

"Section 1. That the Burlington Electric Railway Company of Burlington, Iowa, in consideration of their laying a double track street railway on South Main Street in said city from Cedar Street to Moltke Street and extending said double track on South Main Street from its present terminus at Moltke Street to the entrance of Crapo Park, and the equipment and operation of the same in all respects, in conformity with the ordinances of the city of Burlington

adopted January 29, 1890, entitled, 'An Ordinance authorizing the Union Street Railway Company to construct street railways in the city of Burlington, Iowa, and operate the same by electric motive power,' and ordinances amendatory thereto, are hereby authorized to lay a double track on South Main Street from Cedar Street to Moltke Street, and to extend said double track on South Main Street from Moltke Street to the entrance of Crapo Park, and for that purpose may use the bridge now being built by the city over the Cascade ravine on said street and extend their tracks upon and over said bridge, for which they shall pay to the city \$100.00 per year for the maintenance and repair of the bridge."

It will be noted that this section incorporated by reference an existing ordinance, adopted January 29, 1890, Turning to this incorporated ordinance, Sections 7 and 11 thereof are as follows:

"Sec. 7. In case said city shall at any time pave or otherwise improve the surface of any street or part thereof along which such street railway may run, said company shall pave or otherwise improve the space between the rails of its tracks, switches and turnouts so that it shall correspond with the paving or the improvement of the street outside of the tracks. Said paving or improvement to be done under the supervision of the internal improvement committee and city engineer, and as provided in the ordinance, 'Requiring Street Car companies to Pave or Macadamize,' adopted July 2, 1888, except that said company shall not be required to pave outside of its tracks.

"Sec. 11. The space between the rails on all streets, whether improved or unimproved, upon which said street railway is situated, shall be kept in repair and even with the top of the rails, and if said company shall fail to keep the space between the rails in good repair and even with the top of said rails, the said city may make the said repairs and

charge the same to the said company as a special tax to be collected as other special assessments."

It is to be noted also that Section 7, here quoted, incorporates by reference a previous ordinance, adopted July 2, 1888. Of this incorporated ordinance, Section 1 thereof is as follows:

"Section 1. Whenever the city council shall order any street or part of street paved or macadamized upon which street railway company is located, it shall be the duty of such company to pave or macadamize and maintain three and one-half feet in width each way, commencing at the center of the space between the rails, and such paving or macadamizing shall be done in the manner, at the time and like material as required of the owners of the property abutting upon the street or part of street paved or macadamized."

Construing, therefore, the ordinance of 1896 in the light of the incorporated ordinances of 1890 and 1888, we are agreed in the view that it evinced no intention to relieve the street railway company of its obligation, under the pre-existing ordinances, to "pave" or "otherwise improve" the space between its rails, whenever such paving or improvement should be ordered by appropriate action of the city council.

It is argued that the city has fraudulently misappropriated the funds paid by the plaintiff corporation in its annual payments of \$100 for 23 years, and that the city should be deemed to hold such funds in trust, and should be required to apply a sufficient amount thereof to the payment of the special assessment of about \$1,300.

2. MUNICIPAL CORPORATIONS: equitable considerations relieving from assessment.

We find nothing in the record on which the charge of fraud or misappropriation can be predicated. \$100 per year is not such a princely sum, as compared with the current expense of maintaining and repairing so large a structure.

as to become, of itself, a sufficient circumstance to prove fraud or misappropriation. The evidence in the record discloses that, in the 23 years of use of this bridge, the city has expended more than \$19,000 in such maintenance and repairs. Such expense has been paid out of the bridge fund, into which fund the plaintiff's annual payment has been cast. We reach the conclusion that no contract of exemption purported to be made. Nor do we discover any equities which can operate as an estoppel upon the city.

II. Our conclusion reached in the foregoing paragraph is of itself decisive. Our conclusion upon the second question is as decisive. The contract contended for by plaintiff

3. CORPORATIONS:
legislative control.

was beyond the power of the city council to make. All power in the city council to grant a franchise in any form is conferred upon it by the legislature. The power thus conferred is a limited one. Section 1619 of the Code of 1897 was as follows:

"Sec. 1619. The articles of incorporation, by-laws, rules and regulations of corporations hereafter organized under the provisions of this title, or whose organization may be adopted or amended hereunder, shall at all times be subject to legislative control, and may be at any time altered, abridged or set aside by law, and every franchise obtained, used or enjoyed by such corporation may be regulated, withheld, or be subject to conditions imposed upon the enjoyment thereof, whenever the general assembly shall deem necessary for the public good."

The foregoing was a substantial re-enactment of Section 1090 of the Code of 1873. The effect of this section was to reserve to the legislature full power of future legislation, which should be obligatory both upon the city and upon the operating corporation.

Section 1056-a44 of the Supplement of 1913 is as follows:

"Sec. 1056-a44. That in every such city the owner of

any street railway occupying or using any bridge shall construct, reconstruct and repair the paving or flooring on said bridge three and one-half feet each way from the center line of the space between the rails of its tracks, the same to be ordered, done, assessed and paid for in the manner provided for paving in Sections eight hundred thirty-four and eight hundred thirty-five of the Code."

It is clear, therefore, that this statute imposed upon the plaintiff corporation the very obligation which is sought to be enforced by this special assessment. No question of impairment of the obligation of a contract is involved, nor any other constitutional question. If there were, it would be fully answered by Section 12 of Article 8 of the Constitution of Iowa, as follows:

"Sec. 12. Subject to the provisions of this article, the general assembly shall have power to amend or repeal all laws for the organization or creation of corporations, or granting of special or exclusive privileges or immunities, by a vote of two thirds of each branch of the general assembly; and no exclusive privileges, except as in this article provided, shall ever be granted."

It follows that the order of the district court was right, and it is, accordingly,—*Affirmed*.

WEAVER, C. J., PRESTON and SALINGER, JJ., concur.

CITY OF OSCEOLA, Appellee, v. BOARD OF EQUALIZATION,
CLARKE COUNTY et al., Appellants.

TAXATION: Municipal Waterworks—Exemption. A municipal reservoir (as part of a city waterworks), consisting of a lake 10 acres in area, and of some 75 acres of surrounding land, seeded down to prevent erosion of soil into the lake, is exempt from taxation, even though the city does, *incidentally*, collect rental from the latter land.

Appeal from Clarke District Court.—P. O. WINTERS, Judge.

FEBRUARY 16, 1920.

SUIT in equity by the plaintiff city against the township trustees of Osceola Township as a board of equalization. The purpose of the suit was to adjudicate the question of exemption from taxation of certain real estate owned by the municipality, and to cancel an alleged assessment thereon. There was a decree granting the relief prayed, and defendant appeals.—*Affirmed.*

J. B. Dyer, County Attorney, for appellants.

O. M. Slaymaker, for appellee.

EVANS, J.—The plaintiff is a city of the second class. It has constructed a system of waterworks, at an expense of about \$100,000. The source of water supply is an artificial lake, which it has constructed upon land acquired by it, and which is contiguous to the city, but outside of the corporation. The lake proper covers an area of less than 10 acres. When first constructed, there was no attempt by the city to control the watershed, though surface water constitutes the only source of supply to the lake. The surface of the land surrounding the lake is quite rough, and the soil thereof, when cultivated, washes rapidly. The result of the first experiment was that the wash of the soil soon filled the lake. It was then determined to acquire a larger acreage of watershed, and to protect it against washing by withdrawing it from cultivation and seeding it to grass. The total acreage finally acquired by the city, largely by condemnation, was 76 acres, all of which was withdrawn from cultivation and seeded down. Manifestly, even grass must have attention, and must be either cut or pastured, in order to develop the condition of sod desired by the municipality for its purpose. Some of this land, therefore, was devoted to pas-

ture, and rents were collected for such pasture to a total amount of less than \$100 a year. Because of the collection of such rents, the defendant board contended that this land outside of the area of the lake itself is subject to taxation, and it has assessed the land accordingly; whereas the plaintiff claims that such land is exempt from taxation, under the express provision of Section 1304 of the Code, which is as follows:

"The property of the United States and this state, including university, agricultural college and school lands; the property of a county, township, city, town or school district or militia company, when devoted entirely to public use and not held for pecuniary profit; * * *"

The only question presented to us is whether, under the facts here stated, this land should be deemed exempt from taxation under this statute.

We see little, if any, room for argument to the contrary. Clearly, this land was acquired for public use, and not for pecuniary profit. It is just as clear that it is not now held for pecuniary profit, and that it is fully devoted to the public use for which it was acquired. We have not heretofore passed directly upon the question here presented, but authority is abundant from other jurisdictions. *City of Colorado Springs v. Board of County Com.*, 36 Colo. 231 (84 Pac. 1113); *Town of West Hartford v. Board of Water Com.*, 44 Conn. 360; *Board of County Com. v. City of Wellington*, 66 Kan. 590 (72 Pac. 216); *Ryan, etc., v. City of Louisville*, 133 Ky. 714 (118 S. W. 992); *Miller v. City of Fitchburg*, 180 Mass. 32 (61 N. E. 277); *Board of Water Com. v. Auditor General*, 115 Mich. 546 (73 N. W. 801); *City of Perth Amboy v. Barker*, 74 N. J. L. 127 (65 Atl. 201); *Smith v. Nashville*, 88 Tenn. 464 (12 S. W. 924); *Stiles v. Village of Newport*, 76 Vt. 154 (56 Atl. 662); *State Water Com. v. Gaffney*, 34 N. J. L. 131; *State, etc., v. Collins*, 60 N. J. L.

367 (37 Atl. 623); *State, etc., v. Inhabitants of Verona Twp.*, 59 N. J. L. 94 (34 Atl. 1060).

The fact that a charge is made for a use of the property which is consistent with and incidental to the public use does not change the exemption character of such property. The public use of municipal property frequently, if not usually, involves the collection of rents and rates; water rates from consumers; tuition from school children; reasonable value of support from inmates in poor farm and asylum. These things are all incident to the just and economic administration of a public institution. We think that the collection by the city of the rental in question was a mere incident of the public use and of the maintenance of the public property; that it was necessarily absorbed in the expense of maintenance, and in that sense reduced such expense. It was the clear duty of the officers of the municipality to avail itself of all reasonable methods to reduce such expense of maintenance. The collection of such rent, therefore, as an incident to the maintenance, did not imply a pecuniary profit, but only a just and economical way of meeting, to that extent, the current expense of operation and maintenance of the institution.

We are clear that the trial court properly granted the relief prayed, and its decree is, accordingly,—*Affirmed*.

WEAVER, C. J., PRESTON and SALINGER, JJ., concur.

FRANK CHANDLER, Appellant, v. THOMAS J. HOPSON, Appellee.

BOUNDARIES: Acquiescence—Crooked Line. Principle recognized that long acquiescence in a boundary line, though not a straight line, may preclude inquiry as to the true government line.

Appeal from Scott District Court.—WILLIAM THEOPHILUS,
Judge.

DECEMBER 15, 1919.

REHEARING DENIED FEBRUARY 16, 1920.

THIS case is a special proceeding, brought by plaintiff under Chapter 5, Title XXI, of the Code, to establish the boundary line between the lands of the parties hereto, and for judgment against defendant for damages on account of trespass. The case was tried to the court as in equity. The court found the issues on boundary in favor of defendant, gave plaintiff judgment against defendant for the value of a walnut tree, and rendered judgment against plaintiff for costs, and made it a lien on plaintiff's land, which is his homestead. The plaintiff appeals.—*Affirmed.*

Carroll Bros. and Helmick & Boudinot, for appellant.

J. A. Hanley, for appellee.

PRESTON, J.—1. A number of cases are cited by both parties. We think there is but little dispute as to the law. Being a question of fact, wherein we do not usually set out the evidence at any considerable length, perhaps as good a way as any is to set out the claims of each of the parties, as given by them in their briefs, without restating, in so far as they are alike. The statements are short. Appellant states:

Plaintiff is the owner of about 8 acres of land in Section 26, the north boundary line of which land coincides with the north boundary line of said section. Defendant owns a large tract of land in Section 23, bordering plaintiff's said land on the north. Old fences of many years' standing separated these tracts. Defendant claims that originally it was a board fence throughout its entire length. But a barbed wire at the west end and a hedge at the east replaced

it, some 35 years ago, and have continued till the present. Defendant never had a survey made, to locate his line. He planted the hedge fence about 45 years ago. He thought he was planting it on the line of his property, and he still thinks the hedge is on the section line. The wire fence west of the hedge fence has been in its present position for some 30 years. The surface of the ground at each end of the boundary line is nearly level, and the middle sector declines sharply from the west. The hedge fence, starting from the east end of the line, follows the section line on the level land for about 150 feet, then gradually veers to the south, and at the end, near the middle of the boundary line, it is 4 feet south of the section line; and the said barbed wire fence, commencing at the west end of the line, follows the section line also, about 150 feet, then digresses to the south, being attached to convenient trees, till it joins said hedge fence. The hedge fence has become useless, from age and decay. Defendant abandoned it, and built a hog-tight fence north of it from the east, following the section line at first, then angling north of the section line, till, at its west end, it was 4 feet north of the section line and 8 feet north of his old hedge line. Defendant's land, along the east half of their boundary line, was under cultivation. Along the west half of said line, it was a timber pasture. Adjoining defendant's pasture at the west end was plaintiff's pasture. From plaintiff's pasture, a lane along the boundary line led to plaintiff's barn; thence to the highway. These old fence lines were never recognized by plaintiff or his grantors, and there had always been a dispute about the true line. Defendant built a new wire fence along the line of his old hedge fence. In removing the old hedge, he piled the brush and refuse on plaintiff's land, and burned it there. He cut and carried away a valuable walnut tree.

Appellee says that he denies the section line as the true boundary line, and contends that the true boundary line is

marked by a fence between the premises of appellant and appellee, which fence has been where it now stands for a period of 70 years. The title to the property of appellee was originally in his father, but, for the last 45 or 50 years, has been owned by appellee, who inherited the premises from his father. The original fence between the tracts of ground in dispute was built about 72 years ago, and was located exactly where the present fence is now located. That is to say, in the last 70 years, the partition fence between the premises in dispute has been on identically the same line, and the present fence is identical in location with the original fence, built 70 years ago. The original fence was built throughout its entire length of boards and posts with one wire on top. Appellee further alleges that, about 45 years ago, he planted a hedge fence, about four inches north of the original board fence, and on his own land, said hedge fence connecting with the original board fence on the east end thereof; that prior to the building of said hedge fence, there never had been a dispute or any contention between the respective owners of the premises as to the partition or boundary fence; and that, since the building of said hedge fence, and up to September, 1915, there had never been any dispute or contention between appellee and any of the various owners of the property south of his land; that appellee was born on the premises now owned by him, and never lived anywhere else, and is still living on said premises; that, in the spring of 1915, appellant and appellee had a discussion about the partition fence, the appellant claiming that the fence should be located on the section line, and set off the east half of the fence to be taken care of by appellee, and the west half by appellant; that, at about this time, appellee cut out the old hedge fence, and erected the partition fence substantially on the line of the old hedge fence, though, in one place, a few inches to the north of the old hedge fence, and on his own premises; that the new fence

thus built by appellee connected with the west part of the original fence, built 70 years before, on the east end thereof; that appellant refused to build his portion of the fence, to wit, the west part thereof, and continued to refuse to build his portion of said fence until after the decision of the court in this case.

It is also true that there never was any fence on the section line between the premises of appellee and appellant, and that the location of the original fence has never been changed, and stands today where it has stood for the last 72 years or more. It is further alleged that, a short time before appellee built his part of the fence, appellant had erected a gate at the extreme east end of his premises, and that, in building said gate, which swings on two posts, appellant planted the north post about one and one-half foot to the north of the east end of the old original fence, and that, because thereof, the appellee, in building his fence in the year 1915, and to avoid trouble with appellant, located the east end of his new fence about one foot north of the east end of the original fence, and on the ground of appellee; that, except as to this change, made necessary by appellant, there is absolutely no change between the location of the present fence and the original fence built more than 70 years ago; that, until about September, 1915, the fence, in its present location, was recognized and acquiesced in as the true boundary line, and this continued for a period of about 70 years, during all of which period appellee exercised full rights of ownership of the land on the north up to said fence, and pastured and cultivated said land up to the fence; that the grantors of appellant, during said period of time, also cultivated the 8-acre tract up to the fence line, and never questioned the fence as the true boundary line between the two tracts of ground.

A commissioner was appointed, and additional testimony taken by the court. During the pendency of the case,

Elsie Chandler intervened, alleging that she and plaintiff were joint owners and tenants in common of the property described in the petition. By the decree the court found that plaintiff and intervener are the owners of the property described in the petition, and further found and determined that:

“There was never, at any time, a division or partition fence erected, built, or constructed on the section line between Sections 23 and 26; that, many years ago, to wit, at least 40 or 50 years ago, a partition, boundary, or division fence was built and erected between the lands described in the petition of the plaintiff, and that said fence was built south of said section line, between Sections 23 and 26; that, ever since the building of said fence, the respective owners of the land north and south of said fence occupied and used their respective lands up to said fence, and that the various owners of said land north and south of said fence recognized said fence as the boundary line between the premises, and acquiesced in said fence as the true boundary line between the property separated thereby; that, during said period of 40 or 50 years, none of the owners of the land north and south of said fence ever recognized the section line between Sections 23 and 26 as the boundary or division line between the land north and south thereof. The court further finds that said fence running east and west at a point south of the section line between Sections 23 and 26, was a well-defined and established fence, comparatively straight in an easterly and westerly line, and that said fence has continued all of said period of time, and has always been recognized as the boundary line, until the plaintiff and the intervener herein became the owners of said property, in the year 1914, when, for the first time, as shown by the evidence, objection was made to the said fence as the true boundary line between the properties described in the petition of plaintiff.”

✓The fence erected by defendant was decreed to be the

correct and lawful boundary line, and the court's decree so established it. We deem it unnecessary to set out further details of the decree. From appellant's own statement, it appears to be conceded that defendant's present fence is in the same place where prior fences were maintained for from 30 to 45 years; but the claim is that these fences were not recognized or acquiesced in as the true boundary line by plaintiff or his grantors. Plaintiff testifies that he never did. Plaintiff's witness Kasso says he owned plaintiff's property, and lived on it for eight years, and sold it eight years ago, at which time the fence in its present location was there, and was the boundary line between the two properties during the eight years he owned it. He never claimed anything north of the old fence, and defendant never claimed anything south; never had any trouble or dispute about its being a crooked line; he thought the fence was the line. C. W. Pinneo, produced by appellant, says:

"Well, I guess the hedge was pretty nearly straight. You see, where the fence is here, and where they went down hill, it is pretty steep—they seemed to start off with the fence, up above there pretty straight, and when they got down toward the hill, they had nothing to guide them, and they varied from the line. It must have been where they originally made it. The fence has been there a great many years. The hedge end of the fence has never been changed. I have known the location of the place since about 1880. I have been on Mr. Hopson's place many times. I have seen this fence, driving along the road. It ran east and west, of course. I saw the hedge fence first in 1881. It ran westerly from there."

Plaintiff did not deny that the present fence was the recognized boundary line for many years before he became the owner. The appellee testified that he was 70 years old, and had lived all of his life on the premises now occupied by him. Testifies to a partition fence between the Chandler

premises and his own during all this period of time. Says the original fence was built of boards and posts, and that, 45 years ago, he built the hedge fence close up to the board fence on the north side; that, during all of said period of time, no one has ever disputed the boundary line until about the year 1915, when appellant first disputed it; that, during all of that period of time, he occupied his own premises up to the fence line, and farmed the ground up to the fence; and that the different owners of the land on the south of the fence occupied that land up to the same fence line; and that there never was a word or dispute between him and the owners of the tract of ground on the south, now owned by appellant; that—

“There never was any other boundary line, during my recollection, claimed or admitted by me or any of the other former owners of the property on the south. The west end was not built by someone else; I built it clear through. That fence line has never been disputed as being the correct line by any of the owners prior to Mr. Chandler, and it has been there for 70 years, I guess, or better.”

There is other evidence, and from all of it we are content with the findings of the trial court. Appellant cites cases on the following propositions: The claim of adverse possession cannot be based on disputed fence lines, or lines for mutual accommodation, or on lines placed on another's land by mistake. A mere tentative line, when the true line is not known, will not support the claim of acquiescence. A party cannot acquiesce in a line constructed by himself, and bind the other party thereby. Fences not in a straight line, and those difficult to follow, will not support a claim of acquiescence. Government corners take precedence over meager and uncertain testimony. We think the case is ruled by *Miller v. Mills County*, 111 Iowa 654; *Morley v. Murphy*, 179 Iowa 853; *Stevenson v. Robuck*, 179 Iowa 461; *Tice v. Shangle*, 182 Iowa 601; *Dake v. Ward*, 168 Iowa 118; *Dwight v.*

City of Des Moines, 174 Iowa 178. The claim by appellant that the decree is indefinite is without merit.

2. It is thought by appellant that the court erred in making the judgment for costs a lien on plaintiff's land involved herein, because it is his homestead.

Code Section 4238 provides:

"The costs in the proceeding shall be taxed as the court shall think just, and shall be a lien on the land or interest therein owned by the party or parties against whom they are taxed, so far as such land is involved in the proceeding."

Code Section 2972 reads:

"The homestead of every family, whether owned by the husband or wife, is exempt from judicial sale, where there is no special declaration of statute to the contrary."

This section was enacted prior to Section 4238. It will be noted that, by Section 2972, the homestead is exempt from judicial sale only "when there is no special declaration of statute to the contrary." Section 4238 expressly makes any judgment for costs a lien upon the land involved in the proceedings.

We are of opinion that the decree of the district court is right.—*Affirmed*.

LADD, C. J., EVANS and SALINGER, JJ., concur.

P. F. COLLINS et al., Appellees, v. IOWA MANUFACTURERS INSURANCE COMPANY, Appellant.

APPEAL AND ERROR: *Law of Case.* A holding on appeal that
1 a plea of breach of conditions of an insurance policy was not sustained is a finality on retrial on substantially the same record.

INSURANCE: *Deducting Amount Due on Mortgagee's Policy.* On
2 the issue whether the amount of insurance collected by a mort-
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gagee under his policy should be deducted from the amount due on the policy held by the owner of the property, record reviewed, and held to accord to the insurer ample protection to his rights.

EVIDENCE: Materiality. Evidence of what the officers of an insurance company "would have done" with reference to a policy, had they known certain facts touching incumbrances, is wholly immaterial, under an issue whether a condition of the policy had been broken.

Appeal from Woodbury District Court.—W. G. SEARS, Judge.

FEBRUARY 16, 1920.

ACTION upon a policy of fire insurance, covering a home and its contents. There was a verdict for the plaintiff, and the defendant appeals.—*Affirmed.*

J. T. Sullivan and Henderson, Fribourg & Hatfield, for appellant.

McCormick & McCormick and Ed Baron, for appellees.

EVANS, J.—I. The action was before us on a former appeal. *Collins v. Iowa Mfrs. Ins. Co.*, 184 Iowa 747. Such former appeal was that of the defendant. On such appeal, we reversed the case in its favor, on the ground that the plaintiff had obtained the benefit of proof of waiver without pleading any. On all other grounds our holding was adverse to the appellant. The case being remanded for a new trial, the plaintiffs amended by pleading waiver. The defendant also filed amendments to its pleading. In the main, however, the defenses presented by it continue the same. The defenses relied on are alleged breaches of the conditions of the policy of insurance. It is alleged that the policy had been rendered void by breach of each of the following conditions thereof:

1. APPEAL AND
ERROR: law
of case.

"(d) If the interest of the insured be other than unconditional and sole ownership.

"(f) If any change, other than by death of the insured, whether by legal proceedings, judgment, voluntary act of the insured, or otherwise, takes place in the interest, title, possession or use of the subject of insurance, if such change in the possession or use makes the risk more hazardous.

"(g) If the subject of insurance or any part thereof be or become incumbered by liens, mortgages, or otherwise created by the voluntary act of the insured or within his control."

The questions of breach thus raised were all presented on the former appeal, and passed on by us adversely to appellant's contention. It is, therefore, not open to appellant nor to us to reopen the questions thus closed.

II. The policy in suit bore date July 8, 1914, and, as originally written, named P. F. Collins as the assured. On July 20th an endorsement was entered thereon, to the effect that Delia Collins held title to the property. Delia was the wife of P. F. Collins, and the real property was the homestead occupied by them, and the personal property was their household goods. The policy, in express terms, covered the property, not only of the assured, but also of the members of their family there located. On the latter date, the further endorsement was made on the policy, making it payable to the Northwestern National Bank of Sioux City, mortgagee, as its interest might appear. It appears, also, that the assured had acquired the real property only a few weeks prior to July 8, 1914, and, at the time of their acquisition thereof, it was already incumbered by the prior owners by two mortgages amounting on their face to a total of about \$900. These mortgages had been foreclosed in September, 1913, in an action against the former owner; and the property had been sold under execution on October 22, 1913. The mortgage creditor purchased the same

at execution sale, and held a sheriff's certificate therefor. This fact was not known to P. F. Collins until about the time of the making of the endorsement on the policy, and was not known to Delia Collins at all. There was evidence by P. F. Collins that he had arranged with the Northwestern National Bank that it should purchase the outstanding sheriff's certificate, and that plaintiffs would secure the bank by a mortgage on the property and by insurance; that this information was imparted to the recording agent of the defendant company, whereby he was advised that the Northwestern National Bank was to have a mortgage for \$900. This was the occasion of the endorsement of the mortgagee clause. The recording agent understood the endorsement to refer to an existing mortgage, and understood the amount thereof to be \$100. The purchase of the outstanding certificate was not made by the bank, and it never acquired any interest or lien upon the property. One of the defenses pleaded was that Collins fraudulently concealed from the recording agent the existence of the sheriff's certificate. If the evidence of Collins is to be believed, he not only did not conceal, but he actually disclosed its existence, and disclosed his plan to finance it through the bank. He has corroboration in the fact that the mortgagee clause was attached in favor of the bank, whereby he represented an incumbrance to exist in favor of such bank, though it did not, in fact, exist, except by his anticipation. The trial court submitted the question to the jury as an issue of fact. The jury necessarily found, under the court's instruction, that there was no fraudulent concealment, and such finding has sufficient support in the evidence.

III. It appears, also, that, sometime in 1912, the former owner of the property or his mortgagee had taken a policy of insurance for \$1,000 in the American Central, and that

loss under this policy was payable to the mortgagee. This policy continued in force to the date of the fire, September 22, 1914.

2. INSURANCE: deducting amount due on mortgagee's policy.

The plaintiffs had nothing to do with the making of such policy, and had no interest therein. On the former appeal, one of the contentions of the defendant was that the amount collected by the holder of the sheriff's certificate on that policy should be charged against the amount of recovery in favor of the plaintiffs, and that their recovery should be reduced accordingly. We held on that appeal that there was neither pleading nor proof that any amount had been collected on such previous policy.

By amendment after remand, the defendant pleaded that the holder of the sheriff's certificate collected on his policy the sum of \$1,000, and asked, in effect, that such amount so paid be deemed to have discharged the amount due the plaintiffs for insurance on the building. On the trial, the proof was that the holder of the sheriff's certificate recovered on such former policy the sum of \$300. The trial court instructed the jury that such amount of \$300 should be deducted by them from any amount which they might otherwise allow to the plaintiffs for loss on the building. This instruction was consistent with the partial defense set up by the defendant in its amended pleading. It is now contended in argument, however, that only a pro rata amount should have been charged against the defendant, and that, therefore, it should not have been deemed liable beyond \$500. Instruction to that effect was requested and refused. It appears that the proofs of loss which were formulated by the defendant's adjuster, and which were signed and verified by P. F. Collins, treated the former insurance as concurrent, and incorporated certain computations predicated upon the theory of pro rata liability. Emphasis is laid in argument upon that fact. The contention is a manifest afterthought. There is no intimation of it to be found

in the appellant's pleadings, either original or amended. If there had been, the provision of the proofs of loss in that regard would have been subject to explanation. The computations were not requisite as an essential part of the proofs. As made, they were doubtless intelligible to an expert. That they were not intelligible to a nonexpert might well be found, if issue were made thereon.

We are clear that, by the allowance of \$300 as a constructive credit upon its policy, the defendant got all that its pleadings warranted.

IV. Some expert evidence was introduced, and more was offered, to the effect that, if the home office or the recording agent had known all the facts pertaining to the sheriff's certificate and the previous insurance, the risk would have been classified as prohibitive, by the officers of the defendant company, and would have been canceled. So far as the previous insurance is concerned, the policy in suit in express terms permitted it. So far as the sheriff's certificate is concerned, the evidence of Collins was sufficient to sustain a finding by the jury that this fact was disclosed to the recording agent by Collins as soon as he himself discovered it, on or about July 20, 1914. The trial court submitted the question of prohibitive risk as one of fact, and the adverse finding of the jury was sufficiently supported by the testimony of Collins. It is a matter of grave doubt whether the defendant was entitled to the instruction in its favor on this subject which was given by the trial court.

Some evidence was offered by the defendant and rejected by the court on the part of the secretary at the home office as to what he would have done if he had known the facts disclosed by this record. Complaint is made of such rejection. We find no error in that regard. The defendant was under no burden of showing what it would have done. Its

8. EVIDENCE: materiality.

only burden was to show a breach of some condition of the policy.

Other questions pressed again in argument were fully disposed of on the former appeal. We find no prejudicial error. The judgment below is, accordingly,—*Affirmed*.

WEAVER, C. J., PRESTON and SALINGER, JJ., concur.

S. L. COLLINS OIL CO., Appellant, v. LA RUE PERRINE et al.,
Appellees.

TAXATION: Distress and Sale—Limitation. Taxes may be collected by distress and sale under execution, even after the lapse — of five years from the entry on the treasurer's books.

TAXATION: Cancellation of Interest and Penalties. Failure to pay 2 taxes within four years after the close of the year in which the books are first turned over to the treasurer *ipso facto* cancels all interest and penalties. [But now see Ch. 79, Acts 36 G. A. (1915).]

Appeal from Lucas District Court.—C. W. VERMILION,
Judge.

FEBRUARY 16, 1920.

SUIT to enjoin the collection of taxes by distress and sale under execution. There was a decree dismissing the petition, and rendering judgment against plaintiff for costs. It appeals.—*Modified and affirmed*.

Hickman & Wells and *Vander Ploeg & Johnson*, for appellant.

E. W. Drake, for appellees.

EVANS, J.—The defendant Perrine, as treasurer of Lucas County, issued an execution against the plaintiff for the collection of unpaid taxes appearing upon the treasurer's books

for the years 1912, 1913, 1914, 1915, 1916, and 1917, making a total tax of \$251.28, and penalties thereon amounting to \$71.86. The execution was placed in the hands of defendant Wyland, as constable, who served the same by levy upon certain property of the plaintiff. It averred that the taxes for each of the said years were illegal and void, because, in each year, the assessor assessed the property of the plaintiff at a valuation higher than was warranted by the facts; and that the assessor failed in each year to give to the plaintiff any notice of the assessment.

As to the taxes of 1912 and 1913, the plaintiff pleaded that the tax for each of said years and the penalties thereon were barred by lapse of time, in that the principal tax could not be collected after five years, and in that no penalties or interest could be collected after the expiration of four years.

As to the legality of the assessment, the trial court found against the plaintiff upon the facts. The evidence is not presented to us in the abstract, and no claim of reversal is asked on this feature of the case. The claim of reversal is directed: (1) To the tax of 1912, both principal and penalty on the ground that more than five years had elapsed; (2) to the penalty upon the tax of 1913, on the ground that more than four years had elapsed before the issuance of the execution.

I. Does the authority of the county treasurer to collect taxes by distress and sale under execution cease after the expiration of five years from the date when such taxes were entered upon the treasurer's books?

1. TAXATION: distress and sale: limitation.

The only proposition really presented or argued in appellant's brief is that "the statute of limitations operates to bar an *action* brought by the county to recover taxes when such action is not commenced within five years." This proposition may be freely conceded. This concession, however, does not

avail appellant as sufficient ground of reversal. This is not an *action* to recover taxes on omitted property. It is an action by the plaintiff itself, to restrain the use of process for the collection of delinquent taxes by distress and sale. The plaintiff has presumptively had its day in court, and the original validity of the tax is conclusively adjudicated. The trial court held that the county treasurer may issue process to collect delinquent taxes, even after the expiration of five years. It did not hold that an *action* to recover taxes might not be barred after five years. It clearly devolves upon appellant to meet that holding of the trial court by appropriate point and ground of reversal. It does not meet such holding to show that an action to recover is barred within five years. So far as this holding of the trial court is concerned, therefore, there is nothing before us. Nor do we know of any statute running counter to the holding of the trial court at this point.

II. It remains to consider whether the penalties for the years 1912 and 1913 are barred. Section 1391, Code Supplement, 1913, provides:

"No penalty or interest shall be collected upon taxes remaining unpaid four years or more from the thirty-first day of December of the year in which the tax books containing the same were first placed in the

2. **TAXATION:** cancellation of interest and penalties. hands of the county treasurer."

Pursuant to this provision of the statute, the appellant contends that the collection of the penalties is fully barred after the expiration of four years. The trial court construed the statute to mean only that *additional* penalties should not accrue after four years, and not that penalties accrued within four years should be deemed remitted or barred. The collection of penalties for four years on the taxes of 1912 and of 1913 was, therefore, sustained. If the statute above quoted could be deemed ambiguous, the con-

struction adopted by the trial court has in it a quality of reasonableness. The language of the statute, however, is very direct and sweeping, and it is difficult to say that it presents any ambiguity. It appears to have been overlooked by counsel on both sides that this section, as originally enacted, was construed by this court in *Beecher v. Board of Supervisors*, 50 Iowa 538. It was there said:

"The law, in effect, provides that the interest and penalties are collectible within four years, and not afterward. It operates as a statute of limitations. * * * They [penalties] are not collectible after the expiration of four years. The officer negligently fails to make the collection within that time, and thereby the county loses the money."

The foregoing construction was put upon the language of the statute in its original form, which was not identical with its present form. The form of the statute at that time, as above construed, was as follows:

"That in all cases where the county treasurer in any county in this state * * * has for four years or more neglected to collect said tax by distress and sale of personal property or real estate, upon which said tax is a lien, it shall be the duty of the board of supervisors of the county to remit all of the penalties and interest that may have accrued on such delinquent taxes, on the payment by the person liable for the same of the original amount of such tax." Chapter 29, Acts of the Fifteenth General Assembly.

It will be noted that the statute, as thus originally enacted, was predicated upon official neglect, and contained a mandate to the board of supervisors "to remit all of the penalties and interest that may have accrued on such delinquent taxes;" also, that such remission was conditioned upon the payment of the principal tax.

The present form of the statute, as we have above set it forth, was adopted in the Code of 1897. It eliminated all qualifying conditions as to official neglect or payment of the

principal sum. Instead of directing the board of supervisors to remit penalties and interest, the statute itself remitted them by forbidding their collection after four years. We think it clear that the statute in its present form is even more direct and emphatic than the original enactment.

In view of the construction put upon the original enactment in the *Beecher* case, we do not think that the statute in its present form will bear a construction less favorable to the taxpayer. The direct declaration that "no penalty or interest shall be collected upon taxes remaining unpaid four years or more" must be construed to mean that "no penalties or interest shall be collected upon taxes remaining unpaid four years or more."

This statute has in it a quality of salvage and a touch of mercy. If, after four years of official effort with the whip and prod of penalties and the duress of distraint, collection yet fails, then the statute reverses its method by reducing the load, instead of increasing it; somewhat as sailors jettison cargo to save the remnant and the ship, or as the ox driver drops his long-used goad, and salves its perforations in the rump of the sick ox. We recognize some incongruity in applying this simile to an oil company. But the statute does not differentiate. The plaintiff has stood the statutory test, and may, therefore, be deemed legally impunious. Be that as it may, we reach the conclusion that penalties and interest are not collectible upon the taxes of 1912 and 1913, under the statute then in force. For the later statute, see Chapter 79, Acts of the Thirty-sixth General Assembly (Section 1391, Supplemental Supplement, 1915).

To this extent, the appellant is entitled to relief, and the judgment of the lower court will be modified accordingly; otherwise, it is affirmed.—*Modified and affirmed.*

WEAVER, C. J., PRESTON and SALINGER, JJ., concur.

CURTIS & BARKER et al., Appellees, v. CENTRAL UNIVERSITY
OF IOWA, Appellant.

COLLEGES AND UNIVERSITIES: Conditional Donations—Rever-

- 1 sion. An incorporated institution, which, through its articles, promises to remain permanently under the management of a named religious denomination, may not accept a donation made on the basis of its said articles, and subsequently, even in good faith, in view of unforeseen difficulties, amend its articles and turn its institution over to a different religious denomination, and escape the enforcement of a provision in the instrument of gift for the reverting of the gift to the donors, in case of such change of management.

CONTRACTS: Donation to Religious Body—Violation of Conditions.

- 2 Articles of donation reviewed, and held not to permit the religious institution receiving the gift to violate, even in good faith, the terms of the gift.

GIFTS: Rescission for Breach of Condition. Whether, under the

- 3 particular terms of a gift to a religious institution, the gift would revert to the donors because of the failure to exact a bond of the financial officer of the institution, as required by the terms of the gift, *quære*.

CONTRACTS: Consideration—Loss of Rights and Acquisition of

- 4 Benefits. Loss of rights by one party and the acquisition of benefits by another party afford ample consideration for a contract. So held as to a series of instruments pertaining to a gift to a religious institution.

TRIAL: Waiver of Trial at Law. Permitting law issues, without

- 5 objection, to be tried along with equitable issues, is a waiver of trial by jury.

TRUSTS: Merger of Legal and Equitable Title. Legal and equita-

- 6 ble titles in the same trust property will not be held to merge, when to so hold would nullify the purpose of the parties and destroy the power to create conditions or reservations.

TRUSTS: Cy Pres—Inapplicability. A donee who has deliberately

- 7 deprived himself of the power to carry out the conditions attached to donor's gift may not take cover under the doctrine of cy pres—conceding, *arguendo*, that such doctrine prevails in this state.

Appeal from Marion District Court.—GEORGE B. LYNCH,
Judge.

FEBRUARY 16, 1920.

ACTION in equity to recover money set apart or donated to defendant by Curtis & Barker. The action was brought by the heirs and representatives, who claim that the money reverts to them, because of a breach of the conditions of the contract. The trial court gave plaintiffs judgment for \$13,693.56, with interest from April 20, 1916, that being the amount still remaining in the hands of the defendant on that date. Defendant appeals.—*Affirmed.*

George W. Crozier, George G. Gaass, and Nourse & Nourse, for appellant.

S. F. Prouty, for appellees.

PRESTON, J.—Plaintiffs sued for about \$52,000, the total amount of the donation. Numerous grounds were assigned originally by plaintiffs, and relied upon as constituting breach of the contract; but a part of

1. COLLEGES AND
UNIVERSITIES:
conditional donations: re-
version.

the funds donated were used for running expenses of the university, and to pay pressing debts, with the consent of Curtis & Barker, so that appellees concede that, as to a part of the fund, there was a waiver. They also concede there was a failure of proof as to other grounds, the parties being both now deceased. Appellees now rely on three grounds, which, stated briefly, are that defendant turned over the school to the management and control of another denomination, of different faith and religious tenets; that it diverted and abandoned the school at Pella, and transferred its fund to a competing institution, located elsewhere, and did not require a bond for the safe preservation of the fund, as expressly required by the articles of donation. There is little, if any, dispute in the evidence on

the main issues. It is mostly record testimony. The defendant was incorporated under the laws of Iowa in 1853, as a corporation not for pecuniary profit, as a literary and theological institution, to promote the interests and inculcate the doctrine of the Baptist denomination, and its institution was located at Pella, Iowa. Its articles of incorporation provide, among other things:

"The name and style of this corporation shall be the '*Central University of Iowa*,' and its object shall be the establishment, holding and government of a literary and theological institution in Pella, under the particular auspices of the Baptist denomination, yet offering equal advantages to all students having the requisite literary and moral qualifications irrespective of denomination or religious profession. It shall have perpetual succession, and fill its own vacancies; establish by-laws and make all rules and regulations in accordance with law and these articles, and in general may do all acts which are necessary and proper to carry into effect the object of the corporation.

"Article 4th. Board of Trustees. The government of the university shall at all times be vested in a board of trustees which shall consist of thirty members; and one third of whom and not more than one half shall be ministers of the Baptist denomination in good standing and full fellowship, and twenty-four at least members of the Baptist church in good standing and full fellowship.

"Article 5th. Classes of Trustees. The board of trustees shall be divided into three classes to be numbered 1st, 2d, and 3d. The term of the first class shall expire in one, the second in two, and the third in three years from date and the members of any class may be eligible to re-election.

"Article 7th. Future Election. Hereafter all elections to the board of trustees shall be made from year to year by the trustees themselves, and elections always to be made by a ballot vote of three fourths of the members present at

the annual meeting convened by due notice three months before the time.

"Article 8th. Officers of the Board. The board shall choose from its own members annually and as often as may be necessary a president of the board, a vice-president, a secretary, a treasurer and three other members who together shall constitute an executive committee whose duty it shall be to carry out the design of this incorporation in accordance with the provisions of these articles and the laws of Iowa.

"Article 9th. Amendments. The board of trustees shall have power at any regular meeting to amend these articles provided due notice shall have been given to all the members of the proposed amendment and it shall pass by an affirmative vote of a majority of the board, except that part of Article 2d which defines the object of this incorporation, and that part of Article 4th which requires 24 of the members of the board to be members of the Baptist churches and which parts shall be unalterable."

Later, the articles of incorporation were renewed for 50 years from 1893.

For a good many years prior to 1916, and, as we understand the record, as early as 1881, propositions had been pending at intervals, and efforts made to abandon the school at Pella, and move it to Des Moines. In 1915, the board of education of the Northern Baptist Convention had a meeting in Chicago, at which they requested the Reformed Church in America to take over the defendant university, and meetings were afterwards held to consider the matter. A witness testifies:

"I do not know how often, since I was elected treasurer, in 1900, down to 1916, that either the Des Moines Baptist College or the educational board of the Northern Baptist Convention stirred up this question of turning over the assets, or part of them, but quite frequently.

"Q. Is it not a fact that they were constantly agitating that question, that Pella turn over these assets to Des Moines College, or the educational board, and cease its operation? A. Well, they did not put it in that broad statement. Q. They were more polite about it? A. They were quite diplomatic. Q. Was that the substance of what they asked you? A. That was the substance of it. Q. What is the fact as to whether or not, during those years down to 1916, you resisted that influence? A. We did; strongly. Q. What is the fact as to whether you understood this arrangement in 1916 to be practically an order from the Northern Baptist Association, or educational board, to turn over those things? A. Yes, sir."

The Northern Baptist Association is a suggestive body, not a governing body. But it is the highest body of the Baptist church in the north. It appears that both H. G. Curtis and E. G. Barker, constituting the firm of Curtis & Barker, were students at the Central University at the time of the breaking out of the war, and enlisted in the army. At the close of the war, Curtis returned to the university, and completed his education. Then Barker engaged in farming. Curtis was a lawyer. Both were deeply interested in the school, and were active in its upbuilding. They made many contributions, prior to the one in controversy. It is claimed by plaintiffs that Curtis & Barker were aroused by the talk of removal, and conceived the idea that they would donate shares of stock in a silver mine, an enterprise in which they were engaged. At any rate, on August 26, 1881, Curtis & Barker made a written proposal to the defendant university, as follows:

"In consideration of the love and affection for our Alma Mater, we the undersigned, hereby agree that we will set apart and donate for the use and benefit of the Central University of Iowa, at least 60,000 shares of the capital

stock of the Plomosa silver mine, situated in the state of Sonora, republic of Mexico.

"And we further agree, in order to make the same available and valuable to the university, that we will cause the sale of so much of said stock as shall seem advisable after consultation with the chancellor of the college, and turn the net proceeds to the use of the school.

"The said donation by us to be for such special professorships or work or fund or purpose and on such reasonable conditions as we may name when formally presented to the board.

"And the same to be taken and accepted in lieu of and in full discharge of all our obligations to the university, in other words, all former donations and obligations to be deducted from the total amount otherwise covered by this gift and are canceled hereby.

"We further desire to say that we regard this property mainly as dedicated to the university and desire only to retain such an interest as will, when the mine is developed, enable us in common with those who invest, to reap some benefit from the enhanced value and of the proceeds to cover actual expenses of placing the mine, working the same before company is organized and to cover all expenses on account of the mine previous thereto and time spent in reference thereto.

"And of the balance, if any, we will be still mindful of the needs of the college and act as we are prospered in the enterprise with the same liberality with which the foregoing plan and purpose is seconded by the other friends of Christian education and of the Central University.

"Trusting that all our efforts herein may be eminently successful.

"It is further understood and agreed that at least \$30,000 shall be applied to the college funds from the sales of the first 50,000 shares."

It does not appear that there was any formal acceptance of this proposal by the university, but counsel for both sides concede that it acquiesced therein. The sale of stock was begun soon after this, and about \$11,800 was realized from the disposition of stock, and turned over and used by the university in payment of running expenses and debts, prior to the written instrument, dated September 10, 1883, executed by Curtis & Barker, as follows:

"Conditions of the Curtis and Barker donation to the Central University of Iowa.

"Know all men by these presents that we the undersigned, H. G. Curtis and E. G. Barker for and in consideration of the love and affection we bear our cherished Alma Mater, the Central University of Iowa, have made and by these presents do make and confirm unto said Central University of Iowa, a donation to the permanent fund thereof of the net sum of forty-eight thousand five hundred and nineteen dollars and ninety cents (\$48,519.90) in cash and good notes accepted by the chancellor thereof and the sum of three thousand three hundred and ninety-four dollars (\$3,394.00) in stock of the Plymosa Mining Company, valued at two dollars (\$2.00) per share making a total of fifty-one thousand nine hundred and thirteen dollars and ninety cents (\$51,913.90) all now in the hands of the chancellor which is donated upon and subject to the following express terms and conditions by the donors and to be formally placed in the treasurer of the college on the acceptance of the same with the conditions, by the board of trustees.

"I. The said sum to be a part of the permanent fund of the college to be known and designated as the Curtis and Barker fund shall be kept distinct from the other funds of the college, and the principal sum to be sacredly held and no part of it to be in any manner consumed by or for the use of the university and in no case shall it be liable for the debts, defaults, liabilities or obligations of the uni-

versity nor of the donors, but shall be kept on interest well secured and the interest may be used for the benefit of the school.

"II. The said university shall under no pretence ever be removed from the city of Pella in Marion County, Iowa, but shall be kept and maintained there.

"III. After the A. D. 1885 the work of instruction done and actually maintained and performed in and by said university in its several college departments must be as good as and in all respects equal to the average college work in the colleges of Iowa.

"IV. Curtis and Barker shall each have the right to nominate the occupants of the chairs bearing their names respectively, subject to the approval of the board of trustees by confirmation.

"V. Curtis and Barker shall have the right to name each chair which is endowed in whole or in part by the said funds so contributed by them and they may designate what chairs shall be benefited thereby and the amount to be applied to each but less than five thousand dollars (\$5,000.00) applied to one chair shall not give the right to name the chair, and until such designation is made by them the fund may (or the income therefrom rather) be used for the benefit of the whole school or faculty as the board of trustees shall deem best for the general good.

"VI. The safe-keeping of this fund being of prime importance to all parties, the board of trustees shall have a special watchful and advisory care of it and are enjoined to exercise special vigilance and to this end shall also require of the officers and agents who have the custody and investment thereof a bond or bonds in a penalty or amount deemed sufficient by the executive board to secure the whole amount liable to come into their hands with good and sufficient sureties to be approved by the board conditioned upon the faithful performance of their duties in all respects

touching said fund, said bond to run to the university and to be for its benefit or the benefit of Curtis and Barker as their interests may appear.

"VII. Said donors or either of them, their representatives, agents or attorneys shall have the right to an inspection of the books and vouchers relating to said fund at any time and full statements of the condition of the funds shall be rendered Curtis and Barker once a year or oftener if demanded. The said fund shall be kept in a separate account from the balance of the funds of the institution and losses if any occurring through the neglect, fault or miscarriage of any of the officers or agents of the institution or otherwise shall be made good to this fund by the university so far and to the extent that it is able to do so and its assets that may be legally used for such purpose will allow.

"VIII. Approval is hereby given of the loan of seven thousand five hundred dollars (\$7,500.00) of said funds while in the hands of the chancellor and before covered into the treasury of the university to the Plomosa Mining Company and that the notes and securities given by said company shall be and hereby are accepted and considered as part of this fund and shall be held by the college instead of cash received by the chancellor and when paid by said company shall then be subject to all conditions herein and this condition and disposition of so much of this fund is an express condition of this donation by the donors.

"IX. The income from dividends on the said Plomosa stock (viz., the three thousand three hundred and ninety-four dollars \$3,394.00) shall be held and be disposed of the same as interest on loans and the proceeds from stock hereafter sold shall be a part of said fund and be subject to the same conditions but shall not be sold except with the consent of the donors.

"The foregoing amounts being in full of the proposed

donation of Curtis and Barker of proceeds of sixty thousand shares of Plomosa mining stock.

"The failure to comply with any of the foregoing conditions or in the execution of any of the aforesaid trusts in good faith reasonable consideration being made for unavoidable delays and unforeseen contingencies shall work a forfeiture of the said fund and the whole thereof shall be at once the property of Curtis and Barker upon the declaration of said failure by them or either of them and shall be payable to them, their heirs, representatives or assigns, but shall not in any case be liable to any creditors of the donors or either of them."

These conditions were accepted by the university on September 10, 1883.

The institution continued in full control of the Baptist denomination until about June 6, 1916, when, as plaintiffs claim, the property in controversy and the buildings were turned over to the control of the Reformed Church in America, and the remainder of its property was turned over to the American Baptist Educational Society, to be used in connection with the property of the Des Moines College, in establishing and endowing the Central College, a Baptist institution, located at Des Moines, Iowa. The Reformed Church of America has a central body—the Presbyterian system of government. Its teachings are not the same as the Baptist Church. The Baptists have no higher body to which they are responsible. The Dutch Reformed church in America and the Baptist church are separate organizations. There was turned over to the Northern Baptist Association \$5,000 in securities and over \$100,000 in individual subscription notes, part of them to the endowment fund. All the notes that were held by the Central University, except the Curtis & Barker fund, were so turned over. Later, and upon the amendment of the articles and the turning over of the said funds, the defendant university proceed-

ed to raise another endowment fund, and, since 1916, \$96,000 has been raised, or subscriptions therefor, and the total fund, including the Curtis & Barker fund, is \$110,000. This \$96,000 was raised principally through the constituency of the Reformed Church of America in different parts of the country. On the date last given, to wit, June 6, 1916, defendant, for the purpose of effectuating the change of property and control of the institution, as plaintiffs contend, undertook to amend the articles of incorporation, so that the Reformed Church in America would have absolute control of the institution. They first amended by striking out the provision in the original articles, which were unalterable, and then, in later articles of the same instrument of amendment, substituted other provisions therefor. The amended articles, so far as now material, are as follows:

"1st. That Article eleven (11), be amended by striking out the following, 'except that part of Article Two (2) which defines the object of this corporation, and that part of Article Four (4) which requires twenty-four (24) of the members of the board to be members of the Baptist churches, and which shall be unalterable.' So that said Article Eleven (11) when amended shall read as follows: 'The board of trustees shall have the power at any regular meeting to amend these articles, provided due notice shall have been given to all members of the proposed amendment, and it shall pass by an affirmative vote of a majority.'

"2d. That Article Two (2) be amended by striking out the words 'Baptist denomination' and inserting in lieu thereof the words 'The Reformed Church in America,' so that Article Two (2) when amended shall read as follows: 'The name and style of this corporation shall be the Central University of Iowa, and its object shall be the establishment, holding and government of a literary and theological institution in Pella, Iowa, under the particular auspices of

the Reformed Church in America, yet offering equal advantages to all students having the requisite literary and moral qualifications, irrespective of denomination or religious profession.'

"3d. That Article Four (4) be amended by striking out the words, 'one quarter of whom, and not more than one half, shall be ministers of the Baptist denomination in good standing and fellowship, and twenty-four at least members of the Baptist churches in good standing and fellowship,' so that said Article Four (4) when amended shall read as follows: 'The government of the university shall at all times be vested in a board of not more than sixty-five (65) nor less than fifteen (15) trustees, of whom the president shall be a member ex officio, and a majority of whom shall be members of the Reformed Church in America, in good standing.'"

On April 20, 1916, plaintiffs made formal written demand for a return of the fund known as the Curtis & Barker fund, under the instrument entered into September 10, 1883, and later, in writing, specified the grounds wherein it was claimed that defendant had failed to comply with the terms and conditions of the contract. Among these grounds were the three before set out, and now relied on.

The board of trustees is now under the control of the Reformed Church of America. The president of defendant university is of that denomination, and nearly all of its professors. For some years before this, the professors were not all members of the Baptist church, nor were all of the trustees of that faith. It is being conducted and supported by the Reformed church, to teach the tenets and advance the cause of that church. The buildings and equipment still remain in Pella, and a university has been maintained and operated, under the conditions before stated.

For a better understanding of the situation, some other circumstances should be stated, and it may be that still

others may be referred to later, when considering the different points argued. It further appears that H. G. Curtis was elected a trustee of defendant university in 1870, and was continuously re-elected, and served as such until his death, in 1901, and his widow was elected to fill his last unexpired term, and she was re-elected for the term ending June, 1906. She died in 1904. Mr. Curtis acted for some time as a member of the executive committee of the board of trustees, and served on various committees, including the finance committee. He was vice-president for a time, and to some extent acted as attorney for the university. He removed to Atlantic in 1875, and practiced law there, and was away from Pella a considerable part of the time, for a time in Massachusetts, and for some years in Mexico, engaged in mining. E. G. Barker was elected a trustee in 1874, and served until 1910. He also acted as a member of different committees. He died after this suit was commenced. He made his home in Madison County until about 1890, except a year or two, when he was in Colorado. He lived in Des Moines, after returning from Colorado, and sent his children to the Des Moines College, the Baptist college referred to, for six or seven years after 1890. At the various annual meetings of the trustees, the treasurer made reports, showing the condition of the various funds, including the Curtis & Barker fund, which reports were referred to an auditing committee of the board of trustees. Mr. Vanden Berg was elected treasurer in 1900, and continued in that office until the time of the trial. He was not under bond. He says the trustees did not require him to give bond. As treasurer, he was continuously in charge of the Curtis & Barker fund, during all said time, and was in charge of it at the time of the trial. He says he was willing to give bond, had it been required. The trustees who acted from 1881 to 1884 are dead.

1. Appellees contend that there has been a diversion of

the trust, and of the purposes and intentions of Curtis & Barker, who contributed the fund in question, which is equivalent to and has the effect of an abandonment, even though the buildings remain, and a college is still conducted, under different control; and further, that the articles of incorporation, as they existed at the time of the donation in question, together with the terms of the donation and the acceptance thereof by defendant, constitute a contract. We consider these the more important questions in the case. They cite the celebrated case of *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518 (4 L. Ed. 629). They quote from that case as holding that the contract could not be changed, because the change is not according to the will of the donor, and is subversive of that contract on the faith of which the property was given. They contend that the instant case is stronger in its facts than the case cited, for that there, there was no express provision in the charter preventing its amendment; while in the instant case there is an express provision preventing changes as to the purpose and control in the articles of incorporation of the defendant. In the note in 4 L. Ed. (2d Ed., Extra Ann.) at 910 (1 Rose's Notes [Rev. Ed.] 957) it is said of that case:

"Even a casual exploration of the perplexing labyrinth of subsequent cases wherein its holdings have been applied or distinguished, according as a given state of facts has seemed to necessitate judicial acquiescence or evasion, will leave one profoundly convinced of the entire applicability of these terms ['the great case of Dartmouth College v. Woodward']."

And further, at page 958, that:

"Most familiar among the principles deemed to have been laid down by the college case is the proposition that a corporate charter is a contract, within the protection of the Federal Constitution. It would seem strange that the

courts should still be discussing this simple doctrine. Surely, it will be said, three quarters of a century should suffice to establish and define the application of so plain a proposition."

Some cases are given in the note where the cited case has been distinguished. Plaintiffs also cite the case of *Associate Alumni, etc., v. General Theo. Seminary, etc.*, 26 App. Div. 144 (49 N. Y. Supp. 745), as in point. In that case, the alumni undertook to raise a fund to be donated to the college, which was donated under certain terms as to its use. The college accepted the fund, and used it in accordance with the terms of the donation for several years; but, after ineffectual negotiations to modify the conditions, the college sought to disregard the conditions and to use the fund according to its own direction. The court said:

"But it is urged by the defendants' counsel that the alumni never had any interest in or to this fund; that the fund was derived from contributions made by individuals for the purpose of promoting a specific part of the defendants' work, and that, therefore, defendant was entitled to take, hold, use, and apply the fund and income therefrom to this work, irrespective of the wishes of the association; that there was no consideration for the limitation imposed on the exercise of this right by the defendant; that the fund did not belong to the association, and that, therefore, it parted with nothing on the faith of defendants' agreement, or its assent to the conditions imposed when the fund was transferred. We are at a loss to understand how the defendant could believe or hope that its contentions in this respect would receive the sanction of any court. Honesty and fair dealing requires, when one person has received property from another, under an agreement that he will do something with it, that he should do as he agreed, or else return the property to the one from whom he received it. The fund was offered to the defendant by the associa-

tion on certain conditions. The defendant, in order that it might receive the fund, assented to those conditions, and agreed to be bound by them. It cannot now be heard to say that the association has no title to, or interest in, this fund. If it desired to make such claim, it should have done so when the fund was offered, and not after it had obtained possession of it."

But, on appeal in that case, the judgment was modified. See *Associate Alumni, etc., v. General Theo. Sem., etc.*, 163 N. Y. 417 (57 N. E. 626). In that case, however, there was no provision that the fund should revert, and the court expressed no opinion on that question. The condition alleged to have been violated was in regard to the character of the professorships, and the right of donors to nominate. The court decreed specific performance, and that the purposes of the trust should be carried out. There was no abandonment or diversion to the extent that the purposes of the donors could not be carried out. The court did say, however, in that case, that a trust might entirely so fail, because the purpose for which it was created, became impossible of accomplishment, that the fund ought to be returned to the donor. They cite, also, 1 Beach on Trusts and Trustees, Section 349, as follows:

"Where a charitable trust has been created, and the object of the trust unequivocally designated in the conveyance, it cannot be changed, as a matter of convenience, or with a view to increasing the value or usefulness of the charity, even by the consent of all the parties in being. In a case relating to the establishment of a divinity school in connection with Harvard, and where relief was sought by the corporation of the college, it was held that this court cannot, in the exercise of its chancery jurisdiction, withdraw funds given by individuals to the corporation of Harvard College, in trust for the promotion of a theological education at the college, or for the benefit of a divinity school

attached to the college, and entrust them to an independent board of trustees, to be applied to the support of a divinity school not connected with the college, merely on the ground of inconvenience and embarrassment in continuing the connection between the college and the divinity school."

We do not understand appellant to dispute this legal proposition. Its defenses are on other grounds. It contends that, under the evidence, there has been no abandonment, because the buildings still remain in Pella, and a college is being maintained, and under the same name. Defendant further contends that there is no provision for forfeiture in case of change of denominational management or auspices, when it is done in good faith, because of unforeseen contingencies; that the instrument of date September 10, 1883, in so far, at least, as its forfeiture clause is concerned, is without consideration, and that it did not change the prior proposal of donors; that, where the trustee and the *cestui que trust* are the same, the title merges; that equity will not enforce a forfeiture, and that the failure of the treasurer to give bond, under the circumstances, is not sufficient ground upon which to decree a forfeiture.

We think the trial court rightly held that the fund reverted, because of the violation of the contract by the defendant. By the amendment to the articles of incorporation, and the transfer of the funds and the control to other institutions, the purposes, or one of the main purposes, of the original articles of incorporation of the school, and of the donation, were abandoned. It was no longer a Baptist school, and no longer under the control of the Baptist denomination. The donation clearly creates a trust, which required that the principal should be held intact, and the interest used. It was to be held as a permanent fund. To determine the nature and scope of the work, we turn to the charter, and the terms and conditions of the donation. The charter created a Baptist institution, and provided that this

purpose could not be changed; that it was to be unalterable. The donors desired two things: First, that this college should remain under the control of the Baptist denomination; and second, that it should not be removed from Pella. It was unnecessary that the contract or conditions of the donation should refer to the former, because that was covered by the articles of incorporation. There was no express provision in the charter that would prevent the removal of the school from Pella. This was covered by the conditions, which provide that the institution should not only be kept at Pella, but that it should be maintained there. It seems to us that it is not material whether the change was made by the defendant itself, on its own volition, or whether it was done at the suggestion of the Northern Baptist Association. The defendant did, itself, by its trustees, make the changes in the articles, and turned over the endowment fund and the control. The trust was violated, and the purposes and intentions of the donors of this fund frustrated; and this is so, even though defendant and its trustees may have considered that they were acting for the best interests of the college itself, under the new management. It may be true, as contended by appellees, that the fund would revert to Curtis & Barker and plaintiffs, as their successors, without the clause in the instrument so providing, because the fund is being used for a purpose for which it was not designed. But it seems to us unnecessary to discuss this question, because there is a provision in the writing providing that it shall revert. In *Starr v. Morningside College*, 186 Iowa 790; we had a case where plaintiff sought to recover a fund because of the alleged breach of conditions. That case was different from the instant case in this: that there was no condition in the gift that the college should remain at Charles City, and, upon a merger with another institution, the purposes and the intention of the donor were being carried out.

2. It is thought by appellant that no forfeiture is provided for change of denominational management, if done in good faith and because of unforeseen contingencies, which are provided for in the contract. It is not

2. **CONTRACTS:** donation to religious body: violation of conditions. contended by appellees that they are asking a forfeiture, strictly speaking, but that the fund reverts because of the breach of conditions. The contract, or conditions of the donation, provide that:

"For failure to comply with any of the foregoing conditions, or in the execution of any of the aforesaid trusts, in good faith, reasonable consideration being made for unavoidable delays and unforeseen contingencies, shall work a forfeiture," etc.

It will be noticed that the failure to comply with any of the foregoing conditions shall work a forfeiture. The latter clause, we think, had reference to other matters, and that the parties did not contemplate that the fund itself could be converted to another use. The donation provides that, after 1885, the work of the university must be as good as and equal to the average college work in the colleges of Iowa; also the naming of professors, and the endowment of chairs, etc. It seems to us that the reference to unavoidable delays and unforeseen contingencies applies to such last-named matters. The fund was to revert upon two conditions: First, the failure to comply with any of its conditions; and second, the failure in the execution of the trusts upon which the funds were given.

3. As to the failure to give bond, it is true that, under the record, the trustees did not require the treasurer or the party in charge of the fund to give bond. It may be that the treasurer would be excused, but it was the duty of the trustees to require bond. It is thought that this is a harmless breach, in that the fund is intact, without giving a

3. **GIFTS:** rescission for breach of condition.

bond. That may be so, up to this time; but, if appellant's contention should be sustained, that there is no reverter, and that the trust should continue in the future, the giving of a bond would doubly secure the fund. It may be that this is not of as great importance as some of the conditions, yet, as said in *Moran v. Moran*, 144 Iowa 451, 463:

"The donee is under no compulsion to accept the gift. He is free to elect. The question he has to decide is the ordinary one which arises in nearly every business transaction—whether the thing offered him is worth the price demanded. He may attach to his offer such lawful conditions as his reason, caprice, or malice may dictate, but he is dealing with his own, and the donee, who claims the benefit of the gift, must take it, if at all, upon the terms offered."

See, also, *Miles v. Miles*, 168 Iowa 153, 161; *Rogers v. Law*, 66 U. S. 253.

4. It would seem that there was sufficient consideration. The donors parted with rights, under the instrument of September, 1883, and the college acquired benefits. It may be true, as contended by appellant, that said instrument does not change the prior proposal. The first instrument was but a proposal, and it recites that the donation is upon such conditions as they may name when formally presented to the board. The later instrument simply carries out the provisions of the proposal, and is the final and real contract.

5. Appellant's next proposition is that equity will not enforce a forfeiture. Under this head, it argues further that defendant, in its answer, pleaded that plaintiffs have a plain, speedy, and adequate remedy at law. The plaintiffs asked an accounting, so that the action was properly brought in equity. There was no motion to transfer the cause, or any issue, to the law side. It was tried as an

4. CONTRACTS :
consideration :
loss of rights
and acquisition
of benefits.

5. TRIAL: waiver
of trial at
law.

equitable action. Appellant quotes a definition of forfeiture as "A punishment annexed by law to some illegal act or negligence." As before said, this is not so much a question of forfeiture as it is to enforce the terms of a contract which has been violated. The donors had the right to attach conditions to the gift, and the courts will grant relief for a breach, even though, as contended by appellant, it is a condition subsequent, which is to be strictly construed. Appellees contend that it is not a case of condition subsequent at all, but is for a breach of an express provision in the contract.

6. It is argued by appellant that, where the trustee and the *cestui que trust* are the same, the title merges, and they cite *Swisher v. Swisher*, 157 Iowa 55, 62, and cases from other jurisdictions. Appellees seem to concede that this is the rule, and it is the rule in some cases. But appellees contend that the trustee and the *cestui* are not the same, because the trustees held the fund for the benefit of the college and the donors, under the express terms and conditions of the contract. They cite 39 Cyc. 244, as laying down the rule that an estate or interest in the trust property may be reserved, or result to the creators by virtue of the provision of the instrument declaring the trust. In the *Swisher* case, the same person holding the legal title as grantee in a deed was also made trustee for his own benefit, so that there was a union of the legal and equitable title in the same person, and other such circumstances. There was nothing left outstanding upon which the trust or delegated power could operate. But it does not necessarily follow that, under all circumstances, the union of the two estates, even if there is such a union in this case, works a merger. If there is a reason for keeping the estates separate, or if it is necessary to do so to carry out the purposes and intentions of the donors, equity will prevent a

6. TRUSTS: merger of legal and equitable title.

merger. *Sherlock v. Thompson*, 167 Iowa 1, 11. Here, the instrument making the donation and stating the conditions thereof reserved in the donors an interest and created a trust for the benefit of the college and for their own benefit. To hold that there was a merger would nullify the purposes and intentions of the donors, and destroy the power to create conditions or a reversion.

7. It is thought by appellant that plaintiffs have waived the breaches complained of by acquiescence, negligence, and otherwise, and that their cause of action is stale. As said, appellees concede that there has been a waiver as to a part of the fund, but we see nothing in the record to indicate a waiver as to the fund now on hand, and for which a recovery was allowed. Appellees acted promptly, after the articles of incorporation were amended, the property transferred, and the purpose of the donors changed.

8. There is some suggestion in the arguments in regard to the doctrine of cy pres. We do not understand appellant to rely on that, and there is no brief point on that subject in appellant's brief. The argument at this point is mainly by appellees. Under such circumstances, we shall refer to the question but briefly. Appellees cite *Filkins v. Severn*, 127 Iowa 738, *Miller v. Chittenden*, 2 Iowa 315, *Grant v. Saunders*, 121 Iowa 80, to sustain their claim that the doctrine is rejected in this state, and that defendant may not take this property and divert it to the building up of an institution controlled by the Reformed church, contrary to the conditions imposed by the donors. They quote from the *Chittenden* case as follows:

"If the intention of the donor can be legally executed,
* * * it will be done, but if this cannot be accomplished, the claim of the heir will not be defeated by appropriating the property to another and different object."

Whether or not the doctrine has been rejected, we

think it does not apply in this case. The rule, as stated in some of the cases, is:

"The doctrine of cy pres with reference to charitable trusts in that, where a definite function or duty is to be performed which cannot be done in exact conformity with the plan of the person who has provided therefor, such function or duty will be performed with as close approximation to the original plan as is reasonably practicable." See note to *Hadley v. Forsee*, 14 L. R. A. (N. S.) 49, at 59; *People ex rel. Smith v. Braucher*, 258 Ill. 604 (47 L. R. A. [N. S.] 1015, 1021).

It occurs to us that defendant, having voluntarily put it beyond its power to carry out the purposes of the donors as to the denominational control of the college, is not in a position to ask that this fund be disposed of cy pres. We do not understand that defendant is asking that; neither is anyone else. If that were done, defendant might be required to turn it over to some other institution, such as defendant was before the change. There is no other such institution at Pella to which it could be turned over. The conditions require that it shall be maintained at Pella. The fund is retained by the defendant for purposes other than intended by donors, and contrary to the conditions of the donation. In *People v. Braucher*, supra, it was held that the court cannot, upon abandonment of the use of church property purchased by funds donated by members of the society, and its attempted sale by the surviving members of the congregation, require the application of the proceeds cy pres, if no other organization or society exists which has the same purposes and religious belief as the society to which the property belonged.

We are of opinion that the trial court rightly decided the case, and the judgment is, therefore,—*Affirmed*.

WEAVER, C. J., EVANS and SALINGER, JJ., concur.

F. F. FARINGER, Appellant, v. M. VAN DE HOEF, Appellee.

LANDLORD AND TENANT: Relief from Forfeiture. Equity will

- 1 relieve from the forfeiture of a lease for doing exactly what the parties had agreed on, but which, by mutual oversight, had been omitted from the lease.

EVIDENCE: Parol as Affecting Writing—Avoidance of Forfeiture.

- 2 Parol evidence is admissible, on the issue of the forfeiture of a lease, to show what matters were, by mutual mistake, omitted from the written lease.

LANDLORD AND TENANT: Waiver of Forfeiture. A lessor who

- 3 agrees with his tenant as to the amount of damages which will fully compensate him for a breach of the lease by the tenant, and accepts payment from the tenant, with the express or implied understanding that such payment settles all their difficulties, may not thereafter base a forfeiture of the lease on such breach.

Appeal from Sioux District Court.—C. C. BRADLEY, Judge.

FEBRUARY 16, 1920.

ACTION to restrain defendant from entering on certain land or interfering with plaintiff's possession thereof, and to have the injunction made perpetual, and for other relief. On hearing, the petition was dismissed, and plaintiff appeals.—*Affirmed.*

Hatley & Van de Steeg, for appellant.

Anthony Te Paske and Klay & Klay, for appellee.

LADD, J.—I. The plaintiff, being the owner of two quarter sections of land, sold one of them to defendant and his father-in-law, Bleinberg, and, on April 3, 1919, leased the other to defendant for a term of two years, beginning March 1, 1920, at the annual rental of \$12 per acre. The lease contained, among other provisions, the following:

"First. All manure on the farm up to March 1, 1920,

must remain and be hauled on this farm before November 1, 1919. * * *

"Second. If the second party shall fail to cultivate said premises as herein agreed, or shall fail to keep any of the covenants contained in this lease, or shall assign this lease, or underlet said premises, or any part thereof, then this lease shall, at the election of the first party, be null and void, and the first party, or his legal representative, shall have the right to take possession, using such force as may be necessary, with or without process of law, and all damages growing out of the failure to perform any of the covenants of this lease shall be added to and become a part of the rent recoverable as rent. * * *

"Third. The second party shall haul out and distribute upon the poorest soil upon said premises all the manure and compost suitable to be used."

About August 6, 1919, defendant hauled from the leased premises 27 loads of manure, and spread the same on the land he had purchased. Because of this, plaintiff claims to have elected to treat the lease as "null and void," under the clause quoted, and to retain possession. That a forfeiture, when the lease provides for re-entry on condition broken, may be enforced by the lessor, may be conceded; but this does not obviate that other rule that relief against forfeiture may be granted for mistake, or justifiable reliance on the conduct of the lessor, or on waiver of forfeiture. 1 Pomeroy on Equity Jurisprudence (4th Ed.), Sections 451, 454, *et seq.*

II. The defendant, in hauling the manure on his own land, breached the lease; but it ought not to be said, from the record before us, that he so did willfully. The plaintiff told him where to spread the manure, but it is deducible from the evidence that defendant understood him to have reference to the two thirds thereof, which was to be left on

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from for-
feiture.

the leased premises. Bleinberg kept tally of the number of loads hauled, and more than two thirds of the manure remained on the premises. Plaintiff testified that, when he leased the land, defendant suggested that he would haul some straw thereon; that he should have part of the manure; and that he (plaintiff) said that at least two thirds should remain on the land, and that he finally concluded to arrange the matter later. On cross-examination, he swore that:

"It was provided in the lease that two thirds of the manure should go to my place, and the one third was left unsettled. That should depend on circumstances. Q. But that was part of the agreement, and your understanding was that the manure made in 1921, the second year of the lease, he could leave there, without hauling it off? A. Yes, sir. Q. Well, I said you didn't put that in the lease. A. No, sir."

The witness further related that, when he first talked to defendant about hauling the manure, the latter contended that he was entitled to one third thereof, and that he was to haul the manure in 1919 and to leave the manure in 1921, and that he was entitled to one third of the manure; that:

"Nothing was said in the lease about Van de Hoef's right to leave the manure made in 1922 on the place; that was the agreement between us on the 3d of April, when we made the lease, but it was left out. I can't say whether it was an oversight, forgotten, or what. * * * Q. Now, you say you wanted this lease changed because you didn't want them to have any of the manure made on the place? A. Yes, sir. Q. And you had agreed in this lease to give them one third of it and to keep two thirds for yourself? A. Conditionally. Q. You didn't put any conditions in the lease? A. No, sir, but I was to have two thirds of it."

This evidence was drawn out without objection, and was fully corroborated by the evidence of the defendant and

Bleinberg as to the agreement that "two thirds should stay on the farm, and we could have one third;"

2. EVIDENCE: parol as affecting writing: avoidance of forfeiture.

and they swore that this was agreed to unconditionally, and that both supposed that the lease so provided. This last evidence was objected to, for that, as was contended,

it tended to vary the terms of the written lease, and whatever was said was merged therein. The objection was not tenable; for the evidence was not introduced for the purpose of modifying the language of the lease, but to show that the agreement that defendant was to have one third of the manure accumulated during the term, and might haul that thereon in 1919, in lieu of any that might accumulate during the second year of the term, was omitted by mutual mistake. We entertain no doubt that such was the understanding; that there was no condition such as plaintiff mentioned, which was evidently an afterthought. This is the more apparent from the fact that, immediately after plaintiff, with Bergsma, called, and tendered defendant the notes he had executed for rent, and demanded the surrender of his copy of the lease, the latter consulted a lawyer, and learned, for the first time, that the lease contained no provision allowing him to haul to his own premises one third of the manure. That a court of equity would reform a lease on such a showing, there can be no doubt; and, if so, it is equally certain that such a court will relieve against a forfeiture based on doing precisely what had been agreed upon, but which, through mutual mistake, had been omitted from the lease. See note to *Maginnis v. Knickerbocker Ice Co.*, 112 Wis. 385 (69 L. R. A. 833, 849).

III. But this is not all. One Meines accompanied the defendant and Bleinberg, to aid them in adjusting defendant's differences with plaintiff. The latter swore that

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TENANT: WAIV-
ER OF FORFEITURE.

Meines informed him that defendant admitted he had been wrong in hauling the manure, and wanted to make it right, and spoke of getting the farm again; that, after some talk, he (plaintiff) responded that "we will settle the manure question first, and then we will talk about the farm afterwards;" whereupon \$122 was agreed to be the value of the manure, and for such amount, defendant gave him a check; that he refused to write on the check, at Bleinberg's request, "settled in full," because the check was for the manure alone; and that he then said, "You can't have the place back unless you sign a new lease and a new contract with provisions in it;" that Meines wanted to know "why I wanted a new contract," and, upon hearing the explanation, Bleinberg became angry, and left, and the defendant soon followed; and that, in company with two others, he called on defendant, three days later, and tendered to him the rent notes, and demanded the surrender of the lease; but that defendant declined to talk. On the other hand, Meines' version of the affair was that, in the conversation, he explained that defendant admitted that he had done wrong, and wanted to make it right, and pay the damages; that, at first, plaintiff didn't want to listen; that he would rather have the contract voided; but that, after Meines had talked 20 or 30 minutes, telling him, "if he was a good American citizen, he ought to give the boys another chance," that they made a mistake, but they didn't know any better, and that they couldn't read American, and after he talked to him about half an hour, he came to this conclusion: "Well, I guess I better,—I guess we better put a value on the manure, and let them pay for it;" whereupon he (Meines) remarked that it was the only thing to do; that they then agreed upon the value of the manure, and Meines finally said to defendant, "I guess you better write a check for it, for the full amount, and be done with it;"

that, after they agreed, Mr. Faringer invited them into the house, and they "talked very friendly, and Mr. Van de Hoef pulled out his check book and threw it on the table, and Mr. Faringer wrote out a check, and Van de Hoef signed it, and then I asked Mr. Faringer to put on the back of the check, 'settlement in full,' in regard to the manure question, and I don't know if he completed that or not, but I saw him write something on it." The witness further explained that plaintiff then said, "I want the contract changed now," to which the witness responded that he "thought it was a little too late, because we got a settlement in full for the mistake the boys made. That was all agreed to, and we didn't talk so very much more about it, because we were satisfied we had paid for what we had done." On cross-examination, the witness was asked:

"Didn't Mr. Faringer say to you, 'We will settle the manure first, and then we will see about the farm afterwards?' A. No, sir. Q. At no time? A. At no time. Q. What was you trying to get him to do? A. To settle the mistake of the manure, and for them to say what was right. Q. And he told you that, when you got the manure question settled, then you would talk about making a new contract? A. I didn't hear that."

The defendant testified that the plaintiff did not say he wanted to change the contract until after the check had been given. Undoubtedly, plaintiff indicated to Meines, when he first began to talk, that he wanted to have the contract voided; but, without reservation, proceeded to estimate the value of the manure, and received payment therefor, which covered fully all the damage he had suffered by reason of the breach of the condition in the lease. Defendant paid for the manure in the belief that that was all that was required, and Meines' statement that, "if the old man had not been in such a hurry, I would like to see the thing finished," is not explained, but doubtless referred to

plaintiff's contention that another lease should be executed.

The law seems to be well settled that, where damages resulting from a breach are paid in full, without impairing the obligations or benefits under the lease in any manner, such payment will be deemed a waiver of the breach, and forfeiture may not be insisted on. True, as contended, forfeiture will not be relieved against where the condition is merely collateral, and the damage consequent on the breach is not liquidated, or may not be ascertained. See 3 Story on Equity Jurisprudence (14th Ed.), Section 1734 *et seq.* But this does not obviate the rule that the lessor may agree upon the damages to be paid, and that receipt thereof will waive the forfeiture. In a note to *O'Connor v. Timmermann*, (Neb.) 24 L. R. A. (N. S.) 1063, will be found a collection of cases in which the forfeiture was waived. See, also, *Little Rock Granite Co. v. Shall*, 59 Ark. 405 (27 S. W. 562); *Blank v. Independent Ice Co.*, 153 Iowa 241. Here, the parties met, the day after plaintiff had first called the defendant's attention to the fact that the written lease did not permit him to haul any of the manure on his land; and, the following day, the parties entered into an agreement fixing the amount of the damages, which defendant then paid, and plaintiff received. Though plaintiff contends that this was done with an understanding that the lease was forfeited, he is contradicted by three witnesses, and we are not inclined to interfere with the conclusion of the trial court that the latter were the more credible, and that the amount agreed upon was for the reparation of any wrong done. That the value of the manure taken away would amount to complete reparation can make no difference, if the parties really intended that such payment should reimburse the defendant for all damages consequent upon the breach of the condition. Had the payment been for the manure hauled away only, and so understood by the parties, and without thought of adjusting of differences,

generally, the receipt of payment therefor probably would not have amounted to a waiver of the right to forfeit the lease, for that the tenant, under the terms of the lease as written, was liable for the value of the property taken, even though forfeiture were effective. See *Johnson v. Electric Park Amusement Co.*, 150 Iowa 717. The evidence, however, was such that the court might well have found that payment was in reparation of all consequences of the breach. Undoubtedly, plaintiff said something about treating the lease as voided; but, realizing that he might not obtain payment for damages while insisting on forfeiture, he proceeded with negotiations, and, in his attempt to obtain money for the manure, lost sight temporarily of the large increase in the rental values sought (he had leased the land before the trial at \$20 per acre), and settled with the defendants, with good reason to suppose that they were acting with the understanding that they were adjusting all differences between them. See Section 4617 of the Code. We discover no error in the record, and the decree of the district court is—*Affirmed*.

WEAVER, C. J., GAYNOR and STEVENS, JJ., concur.

FIRST NATIONAL BANK OF MARENGO, Appellee, v. JOHN M. ATHEY, Appellee, et al., Appellant.

PRINCIPAL AND AGENT: Rights and Liabilities as to Third Persons—Repudiation of Acts of Agent. A principal may not repudiate the acts of his agent, as being in excess of authority, while he retains the fruits of the unauthorized act.

APPEAL AND ERROR: Review—Harmless Error—Error Favorable to Appellant. In an action on a note, where it is claimed that the defendant was a surety only, and that the principal maker had, without his authority, filled in plaintiff's name as the payee, the same having been blank when the note was made, an instruction making the question of excess of authority by the

principal controlling, and defeating the note, even though the defendant had received the full benefit of its proceeds, was more favorable to the defendant than he deserved, and was, therefore, error of which he could not complain.

APPEAL AND ERROR: Harmless Error—Refusal of Special Inter-
3 **rogatory.** The refusal of a special interrogatory which was a proper one, and might well have been given, was without prejudice, where, under the instructions given, the verdict, as rendered against the appellant, could not have been rendered without a finding against him on the requested interrogatory.

APPEAL AND ERROR: Harmless Error—Failure to Show Nature
4 **of Answer Sought.** Where the record does not disclose what the testimony of the witnesses would have been, where objections to questions were sustained, the Supreme Court will not consider the alleged error on appeal.

Appeal from Iowa District Court.—R. P. HOWELL, Judge.

OCTOBER 23, 1919.

REHEARING DENIED FEBRUARY 16, 1920.

SUIT upon a promissory note against the two defendants as joint makers. The only defense interposed was by the defendant Murphy. The defense was that he was surety only, and that, after he had attached his signature to the note, the name of the payee was inserted therein, without his consent or authority. There was trial to a jury, and a verdict and judgment for the plaintiff. The defendant Murphy appeals.—*Affirmed.*

Sullivan & Kirby and W. E. Wallace, for appellant.

Stapleton & Stapleton, for appellee.

EVANS, J.—The note in suit is for \$240, and is dated September 8, 1911. It was duly signed by both defendants, while it was blank as to the name of the payee. The defendant Athey presented the same in such condition at the plaintiff bank, for the purpose of negotiation. With his consent, the name of the plaintiff was inserted as payee, and the same

was then and there delivered to the bank, in consideration of the payment by the bank to Athey of \$240. Murphy pleaded as a defense that he signed the note as surety for Athey, and that he consented only that the name of the German-American Savings Bank, or that of the People's Savings Bank, might be inserted therein as payee, and that he especially instructed Athey not to insert the name of plaintiff bank as payee.

The plaintiff pleaded in reply, in substance, that Murphy was not a surety on the note, but was the beneficiary of the loan to be obtained thereon; that he was a principal signer, and not a surety, in that this method had been adopted by Murphy and Athey, whereby Murphy was to pay the note, and thereby to discharge a debt of \$240 owed by him to Athey. Only two issues of fact presented by the pleadings were contested in the evidence. These were:

1. Did Murphy instruct Athey not to insert the name of the plaintiff as payee in the note?

2. As between Murphy and Athey, was Murphy a surety, or was he the principal debtor?

The general contention for the appellant is that only the first of the above questions was material, and that an affirmative finding thereon would be conclusive of the case in favor of Murphy. The more important errors assigned are centered upon this proposition.

Before proceeding to consider the specifications of error, we may as well set forth here certain portions of the record which form the principal storm center of the appeal. The claim that Athey violated his instructions in permitting the name of the plaintiff to be inserted as payee of the note is based upon the following testimony of Murphy:

"At the time I signed it, the note was not made payable to anyone. John Athey brought the note to me to be signed. At that time, I told Mr. Athey the note should be made payable to the German-American Savings Bank of Marengo.

He came to me and wanted me to help him get that much money, and I told him my credit was taken up at the First National Bank, and I couldn't do it there, and he said he had made arrangements to get it at the German-American Savings Bank. I told him I was willing to help him get it at the German-American Savings Bank, or the People's Savings Bank of Marengo, and I told him he might fill in the name as payee in the note of either the German-American Savings Bank or the People's Savings Bank."

This claim rests also, as a matter of law, upon Section 3060-a14, Code Supplement, 1913, of the Negotiable Instruments Act, as follows:

"Sec. 3060-a14. Where the instrument is wanting in any material particular, the person in possession thereof has a prima-facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a prima-facie authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time."

The testimony of Murphy, both on the question of his instructions to Athey and on the question of suretyship, was contradicted by the testimony of Athey. According to the testimony of Athey, he was not limited in his authority as to the selection of the payee; and furthermore, the negotiation of this note was the method adopted by the makers, to

enable Murphy to pay Athey a debt due him for the amount of the note.

The trial court gave the law of the case to the jury in Instructions Nos. 2 and 3, as follows:

"2. Now, the defendant Murphy in this case claims that, at the time he signed this note, he informed Athey that he did not want the note given to the First National Bank, and that he did not want the name of the First National Bank filled in. The burden of proof is upon the defendant Murphy to establish this claim of his by a preponderance of the evidence; and, if he has shown you, by a preponderance of the evidence, that, at the time he signed the note, he informed Athey that he did not want the name of the First National Bank filled in as payee, then you are instructed that the plaintiff in this action cannot recover upon this note, unless it is allowed to recover on account of some of the grounds hereinafter stated; but if the defendant Murphy has failed to establish his claim, then you are instructed that the plaintiff is entitled to judgment as against the defendant Murphy for the full amount of the note.

"3. The plaintiff, as a further claim against the defendant Murphy, says that, on or about the 8th day of September, 1911, Murphy was indebted to Athey in the sum of \$240, growing out of the transaction of buying and shipping some stock, and Murphy agreed with Athey to make out a note for that amount, with the payee left blank, so that Athey could fill in the name of the payee and get the money on said note, and that the note in suit was given by Murphy under those conditions. The defendant Murphy denies this claim of the plaintiff. Now, you are instructed that the burden of proof is upon the plaintiff to establish the claim made by it in this paragraph of these instructions by a preponderance of the evidence, and if the plaintiff has shown you, by a preponderance of the evidence, that Murphy signed the note under the conditions claimed by plaintiff, as set out

in this paragraph of these instructions, that then and in that event plaintiff would be entitled to recover in this action the full amount of said note, *unless the defendant Murphy has shown you by a preponderance of the evidence that, at the time he signed said note, he did so with the agreement or understanding with Athey that the name of the First National Bank was not to be filled in in said note.*"

With so much of the record before us, the specifications of error may be discussed without undue elaboration.

I. Murphy will be referred to herein as though sole defendant. He moved to strike so much of plaintiff's reply as took issue with his allegation of suretyship, and which pleaded affirmatively that, as between him and Athey, he was the principal debtor. The general ground of this motion was that such matter was immaterial and irrelevant, and not pertinent to any material issue in the case. It will be noted, from what has already been said concerning the record, that the defendant, by his answer, first tendered issue on the question of his suretyship. The reply, both in its denial and in the affirmative matter, was responsive to the defendant's allegation of suretyship. The defendant, in his answer, treated the question of suretyship as material to his defense. If material, the matters pleaded in the reply contradictory thereto were necessarily material, also. It is true, however, that the issue thus made by answer and reply was, in a sense, collateral only to the main issue. The main issue was, Was the name of the payee inserted in the note without the authority of the defendant? The materiality of the question of suretyship was that, if the defendant was surety only, then the law of the case was wholly contained in Section 3060-a14 of the Negotiable Instruments Act, above quoted. On the other hand, if the defendant, as between him and Athey, was the principal, and not a surety, then the law of the case was not wholly contained in said section. If it were true that the defendant was the prin-

principal, in that, as testified by Athey, the note was negotiated with the mutual purpose of both makers to enable the defendant to pay his debt to Athey, then another rule of law controls the rights of the parties. In such event, the defendant was the borrower, and Athey was his surety. In the negotiation of the note, the defendant was the principal, and Athey the agent. The defendant concedes that Athey had a limited authority to insert the name of the payee. His complaint is that Athey exceeded his authority, and violated express instructions.

Ordinarily, it is true that an agent cannot bind his principal by acts which exceed his authority. But this rule has many qualifications. Concededly, Athey was the agent

1. PRINCIPAL AND AGENT: rights and liabilities as to third persons: repudiation of acts of agent.

of the defendant for the purpose of filling into the blank space the name of some payee. Concededly, also, it was expected that he should receive the borrowed money from the payee, whose name should be inserted.

Athey did cause to be inserted the name of a payee, and, pursuant thereto, he received from such payee the full face value of the note. If Athey's testimony is true, Murphy got the full benefit of the money so received, in that it was applied, in accord with the agreement between the two makers, to the satisfaction of Murphy's debt to Athey. If Athey exceeded his authority by inserting the name of plaintiff as payee, then we have a case where the principal obtained the full benefit of an act of his agent which was in excess of his authority. It is a rule of law long ago settled in this state that a principal may not repudiate the act of his agent as being in excess of authority, while he retains the fruit of the unauthorized act. In such case, authority will be presumed, as a matter of law. *Eadie, G. & Co. v. Ashbaugh*, 44 Iowa 519; *Farrar v. Peterson*, 52 Iowa 420; *Hartley St. Bank v. McCorkell*, 91 Iowa 660; *Cassady v. Manchester F. Ins. Co.*, 109 Iowa 539; *Fleishman & Co. v.*

Ver Does, 111 Iowa 322; *Moyers v. Fogarty*, 140 Iowa 701. The motion to strike was, therefore, properly overruled.

II. What we have said in the foregoing division has an important bearing upon the questions involved in Instructions 2 and 3, which we have above set forth, and which are vigorously assailed in the specifications of

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error favorable
to appellant.

errors. We may as well consider these two instructions together. It must be conceded that they are somewhat awkwardly put together. We find, however, that Instruction 2 is strictly correct. Instruction 3 is erroneous, but not so in the respect urged by appellant. The error thereof is against the plaintiff, and not against the defendant. The principal complaint of appellant against Instruction 2 is directed to the qualifying clause, "Unless it is allowed to recover on account of some of the grounds hereinafter stated." The argument is that it should have no qualification in this respect. Furthermore, it is complained that there were no "grounds hereinafter stated" to be found in the instructions, and that the qualifying clause was, therefore, meaningless and misleading. Taking Instruction 3 as it was and is, it is true that there was no occasion for this qualifying clause, and that there were no "grounds hereinafter stated." Instruction 3, as written, added nothing to Instruction 2. The substance of both instructions is that, if Athey was directed by Murphy not to negotiate the note to the plaintiff bank, then the plaintiff cannot recover. On the other hand, if Instruction 3 had been strictly correct, then the qualifying clause under complaint would have been necessary to the correctness of Instruction 2. The error in Instruction 3 consists in its last clause, which we have italicized above, and which is as follows:

"Unless the defendant Murphy has shown you, by a preponderance of the evidence, that, at the time he signed said note, he did so with the agreement or understanding with

Athey that the name of the First National Bank was not to be filled in in said note."

This clause should have been wholly omitted. The instruction^a should have ended with what preceded. If this instruction had ended at this point, it would have rendered both instructions harmonious. As it was, Instruction 3 added nothing to Instruction 2. The error, however, was wholly to the advantage of the defendant, and could not be prejudicial to him. The effect of Instruction 3 was to make the question of excess of authority by Athey controlling, and to defeat the note, even though the defendant had got the full benefit of its proceeds. The error, therefore, worked no prejudice to the defendant. If the judgment below had been against the plaintiff, quite a different question would be presented.

III. The defendant submitted to the court a special interrogatory which would require the jury to find specifically whether Murphy had forbidden the insertion of the

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error: refusal
of special in-
terrogatory.

name of plaintiff bank as payee. The special interrogatory was refused. The interrogatory was a proper one, and might well have been given. Nevertheless, the failure to give it was wholly without prejudice, up-

on this record. Under the instructions as given, the jury could not have rendered a verdict for plaintiff without finding against Murphy on that specific question of fact. The record clearly discloses, therefore, that the jury did find in the negative on that question.

IV. The appellant complains of the expression, "agreement or understanding," which is to be found in the latter part of Instruction 3. The argument is that it was sufficient for Murphy to show that he had *instructed* Athey what he should not do, and that it was not necessary that there should be any agreement or understanding, and that there was no evidence of any agreement or understanding. It is

sufficient to say that the expression complained of is to be found in the last clause of Instruction 3. Inasmuch as we hold that this was too favorable to the defendant, and, for that reason, should not have been given at all, it leaves no ground of reversal at this point.

V. Several specifications of error are predicated upon questions of evidence. In several instances, the trial court sustained plaintiff's objections to questions put by defend-

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show nature of
answer sought.**

ant's counsel to his witnesses. The record does not disclose what the testimony of the witnesses would have been in any case where objection to the question was sustained. We cannot say, therefore, that it was prejudicial error. In so far as the testimony sought may be inferred from the form of the questions, we are able to see little materiality in it. Many of the questions were predicated upon the theory that the question of direction by Murphy to Athey was the one controlling question in the case. Some questions addressed to the defendant himself were rejected. These asked for the reasons he had for giving the direction to Athey as claimed. This was in the nature of cross-examination, which was the privilege of the other side. He was permitted to state all that he said to Athey. This included the reason. If he had other "reasons," not stated to Athey, we see no aid to his defense in the statement of them. In any event, the admissibility of that kind of evidence is somewhat a matter of broad discretion with the trial judge. We see no fair ground to interfere with the rulings. Inasmuch as the jury, under the instructions, necessarily found against the defendant on his one defensive fact, we cannot deem an error prejudicial, unless it bears upon that question of fact.

We have gone through the careful and thorough argument for appellant with much care. It would serve no useful purpose to dwell specifically upon each assignment there-

in. What we have already said is practically decisive of all of them. We find no error prejudicial to appellant. The judgment below must, therefore, be—*Affirmed*.

LADD, C. J., PRESTON and SALINGER, JJ., concur.

MARTHA E. FLETCHER, Appellee, v. CLAY KETCHAM, Appellant.

APPEAL AND ERROR: Interrogatories In Re Undisputed Questions. Error may not be predicated on the submission of interrogatories and the answering thereof in full accord with complainant's theory of the facts.

TRIAL: Contradictory Instructions. Instructions are not contradictory simply because they separately and independently present plaintiff's theory of the facts and defendant's defensive matter thereto.

Appeal from Davis District Court.—SENECA CORNELL, Judge.

FEBRUARY 16, 1920.

ACTION to recover damages for breach of promise. The answer was in general denial, and the further affirmative defense of settlement, evidenced, as is alleged, by a written receipt. There was a trial to a jury, and a verdict and judgment for the plaintiff. Defendant appeals.—*Affirmed*.

Sloan & Sloan, for appellant.

Walker & McBeth, for appellee.

PRESTON, J.—The case has been here before. *Fletcher v. Ketcham*, 160 Iowa 364. The nature of the action, issues, and so on, will be there found, and will not be now repeated. The case was reversed on the former appeal, because of an erroneous instruction in regard to an attorney testifying. After the reversal, a change of venue was granted to Davis

County. Most of the objections now argued were determined in that case, and adversely to defendant. Some additional evidence was introduced by both sides, but, in the main, the case was tried on substantially the same record as before, by stipulation that the transcript or abstract on the former appeal might be used. The same interrogatories were submitted to the jury as before. With three exceptions, the instructions are the same in this case as in the first trial. Quite a number of errors are assigned. Appellee contends that but four of them are properly presented. We shall consider such as are argued and seem to be controlling.

Appellant states in argument that "no evidence was introduced by the defendant to controvert the promise of marriage or the breach thereof, so that the case is quickly boiled down to the question of settlement and receipts taken." And again:

"The question of promise of marriage, its breach, and seduction, were not controverted by the defendant, except by the pleadings, so that the whole situation revolves around the settlement."

1. The fifth interrogatory submitted to the jury, and the answer, is this:

"Int. No. 5. Do you find from the evidence that the words, 'and in full of any claim against Clay Ketcham,' on Exhibit No. 4, have been added to that receipt since the plaintiff signed it? Ans. Yes. (Signed) L. C. Anderson, Foreman."

It is urged by appellant that the finding of the jury in such answer is not supported by the evidence. The same question was presented on the former appeal, and we then held that there was ample testimony to take the case to the jury on the question of the genuineness of the two receipts in issue, and that the special finding has support in the testimony. The evidence on the last trial was substantially

the same as on the first, on this proposition, though, as we understand the record, an additional witness was introduced to sustain plaintiff's claim, and handwriting experts were used. There is testimony both for and against, and such a conflict as to take the case to the jury.

2. Four other interrogatories were submitted to the jury, and answered to the effect that there was a marriage contract between the parties, to be consummated at a certain time, and that the marriage was postponed twice, at the request of defendant, and so on. Appellant contends that the court erred in submitting such interrogato-

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rogatories in re
undisputed ques-
tions.

ries, because they are not determinative or decisive of the case, and should have been refused, because they were misleading and confusing to the jury as to the real issues. We are inclined to think that the interrogatories were properly submitted; but, without determining that question, it seems to us that, in view of the statement by appellant before set out, that no evidence was introduced by defendant on these subjects, we are unable to see how there could have been any confusion in the minds of the jurors, or any prejudice to the defendant from the submission of such interrogatories.

3. After stating the issues, the court, in Instruction 5, said to the jury, in substance, that, under the issues thus made, the burden of proof is on the plaintiff, and that, in

2. TRIAL: con-
tradictory in-
structions.

order to recover, she must prove the allegations of her petition by the greater weight or preponderance of the evidence, and that, if she had done so, the jury should find for plaintiff; otherwise, they must find for the defendant. It is thought by appellant that this instruction ignores the question of the alleged settlement, and that it is inconsistent and in conflict with Instructions 12 and 13, which relate to defendant's affirmative defense of settlement. It seems to

us it would have been a very easy matter for the trial court to have added a few words to Instruction 5, to the effect that, if they found the allegations of plaintiff's petition established, she would be entitled to recover, unless they found there was a settlement. Had the court done this, it would have avoided an appeal, probably, as to this point at least, and would have avoided extended argument, citation of authority, and additional labor for this court. But the instructions must be all considered together, as a whole. The jury could not have been misled, and have overlooked the question of settlement. That was really the vital point in the case, and the jury could not have understood otherwise. As said, there was no evidence introduced by defendant in denial of plaintiff's claim that there was a promise of marriage, and a breach thereof. It is clear that Instruction 5 refers briefly to plaintiff's claim, as set out in her petition. The jury could not have understood otherwise. Then the court later goes on and instructs more fully on the question of the alleged settlement. To the point that Instruction 5 is inconsistent with Instructions 12 and 13, as they claim, appellant cites *Latta v. Illinois Cent. R. Co.*, 151 Iowa 244; *Ford v. Chicago, R. I. & P. R. Co.*, 106 Iowa 85; *Gibson v. Burlington, C. R. & N. R. Co.*, 107 Iowa 596; *Loomis v. Des Moines News Co.*, 110 Iowa 515. Appellant argues that contradictory and conflicting instructions are usually held to be erroneous, except in cases where the court can say there was no prejudice. The last three cases above cited are cited to sustain this last proposition. In the last-named case,—that is, the *Loomis* case,—the appeal was from an order granting a new trial, because the trial court may have been in doubt whether the jury was not misled by the instructions alleged to have been contradictory. Appellee cites to the proposition that instructions must be read and considered as a whole, and their meaning thus ascertained, and not from any one or parts of the charge;

that, when so construed, if the instructions as a whole fairly present the law, they will not be condemned, although one standing alone may not be complete. *State v. Golden*, 49 Iowa 48; *Beazan v. Inc. Town of Mason City*, 58 Iowa 233; *Mitchell v. Pinckney*, 127 Iowa 696; *State v. Sheets*, 127 Iowa 73; *State v. Mitchell*, 130 Iowa 697; *Fish v. Chicago, R. I. & P. R. Co.*, 81 Iowa 280; *Martin v. Murphy*, 85 Iowa 669; *Templin v. Inc. City of Boone*, 127 Iowa 91; and other cases. As said, the question as to the alleged settlement was the principal point being contested. That matter was continually kept before the jury. It would be idle to say that the jury were misled and did not understand that, if the matter was settled, as contended by appellant, the plaintiff could not recover, even though she had proved the promise of marriage and the breach thereof. And this is especially true in view of the fact that the jury found specially against defendant in the special interrogatory on the question of settlement. If Instructions 5 and 12 were given or combined in one instruction, there would, perhaps, on the face of it have been less apparent conflict.

4. Instructions 12 and 13 read thus:

"12. The plaintiff alleges that the last nine words in the receipt, Exhibit 4, were inserted in said exhibit after she had signed it, and without her knowledge or consent. The burden is on plaintiff to prove by a preponderance or greater weight of the evidence the said alleged insertion of said nine words, and, if she has failed to so prove such alleged insertion of said nine words, you should consider that said exhibit was in the same language when it was signed as it is at this time. But whether or not said words were written into said receipt after plaintiff had signed it is not necessarily determinative of the case: that is, if you find the facts referred to in the next instruction in favor of the defendant, then the cause is not necessarily to be found against the de-

fendant, even though you should find the last nine words to have been written after plaintiff had signed the paper.

"13. If you find from the greater weight or preponderance of the evidence that, at the time of the claimed settlement, the plaintiff and her mother and brother, in plaintiff's presence and with her knowledge, by their words, actions, or conduct led and induced B. F. Ketcham, as a reasonable man, to believe, and plaintiff knew, or, as a reasonable person should have known, that he believed that she, the plaintiff, accepted the money that day paid to her, as full satisfaction of all claims she had against the defendant, including the claim for breach of promise involved in this case, and you further so find that the money that day paid to plaintiff would not have been paid to her, had not the said B. F. Ketcham so understood and believed, then your verdict should be for the defendant."

No. 13 is substantially a copy of defendant's offered Instruction No. 2. This was given on the defendant's claim and theory that the plaintiff is presumed to intend to be understood according to the reasonable import of her words. Their contention is that Section 4617 of the Code, and *Sessions v. Rice*, 70 Iowa 306, apply, because of the testimony of plaintiff and her witnesses. We have already said that there was a question for the jury whether the settlement was as claimed by defendant or plaintiff, and that the evidence supports the finding of the jury. This disposes of appellant's contention that, whether Instructions 12 and 13 were right or wrong, they were the law of the case, and that, if the verdict is against them, it must be set aside. The facts referred to in No. 13, as defendant claims them, make a controverted question for the jury. The jury having found against the defendant as to the facts referred to in No. 13, there is no inconsistency in the verdict, and it is not contrary to either of the two last-named instructions. It was plaintiff's contention that only the bastardy case was being

settled, and not this breach of promise case, or any other.

After considering the entire record, we are of opinion that there was no prejudicial error. The judgment is, therefore,—*Affirmed*.

WEAVER, C. J., EVANS and SALINGER, JJ., concur.

IOWA NATIONAL BANK, Appellee, v. J. E. DAVIS, Appellant,
et al., Appellee.

BILLS AND NOTES: Failure of Defense of Fraud. The transferee
1 of a negotiable promissory note is under no obligation to show
that he is a holder in due course *in fact*, when the maker wholly
fails to establish his defense of fraud.

APPEAL AND ERROR: Erroneous Taxation of Interest. An er-
2 roneous computation of interest may not be raised for the first
time on appeal, even in an equity case.

COSTS: Protest Fees When Protest Waived. Protest fees may not
3 be taxed, when the note contains a provision waiving protest.

APPEAL AND ERROR: Remand to Correct Error. While the court
4 will not permit a question to be first raised on appeal when
such question might have been corrected by motion, yet it may
affirm and remand without prejudice to the right to move for
correction. So held as to an erroneous taxation of interest.

Appeal from Dallas District Court.—LORIN N. HAYS, Judge.

NOVEMBER 22, 1919.

REHEARING DENIED FEBRUARY 16, 1920.

THIS action was brought at law on a promissory note, executed by appellant, J. E. Davis, and endorsed by Dilenbeck. Equitable answers were filed, and the cause was tried as in equity. There was a judgment in favor of plaintiff and against defendants for the amount claimed. The defendant J. E. Davis appeals.—*Affirmed*.

D. C. Waggoner, L. T. Shangle, and S. Trevarthen, for appellant.

C. L. Nourse, White & Clarke, and Dugan & Dugan, for appellees.

PRESTON, J.—The note sued was given by defendant Davis to Dilenbeck on December 3, 1915, with interest at 6 per cent from January 1, 1916, semiannually, defaulting interest at 8 per cent, semiannually. The note was due July 1, 1916. Plaintiff alleges that, before maturity, and for a valuable consideration, and in due course of business, Dilenbeck sold the note to plaintiff, and, by endorsement thereon, guaranteed the payment thereof. The defendants answered separately, Davis denying that plaintiff is a bona-fide holder of the note, and by cross-petition alleging that the note was obtained from him by Dilenbeck by duress and fraud, and that the same was without consideration. He prayed for a dismissal of the petition, and, as against his codefendant, prayed that, if judgment was rendered against him in favor of plaintiff, he should have a set-off judgment against Dilenbeck. Dilenbeck, answering, admits the transfer of the note to plaintiff, and admits that plaintiff is a good-faith purchaser, and, for answer to the cross-petition of Davis, denies allegations of duress, fraud, and want of consideration, and avers that all of said matters were fully adjudicated in an action between Dilenbeck and Davis in the superior court of Perry, Iowa. Dilenbeck set up some other defenses, but they were determined against him, and he has not appealed. The trial court found for plaintiff as against both defendants, and that the validity of the note had been adjudicated, as alleged.

1. Appellant argues that the burden of proof is on the bank to show that it did not have notice of the fraud, and that plaintiff introduced no evidence to show that it was

1. **BILLS AND
NOTES: failure
of defense of
fraud.**

a good-faith holder of the note. And they say that, where there is fraud in the inception of the note, the court may not direct a verdict in favor of such purchaser, even though plaintiff's denial of notice is uncontradicted. They cite *Robertson v. U. S. Live Stock Co.*, 164 Iowa 230, 234; *Mc-Night v. Parsons*, 136 Iowa 390. This may be the rule where defendant alleges and introduces evidence tending to invalidate the note. There is no question here of directing a verdict. But, if the defendant has no defense to the note, the question of notice is not material. No competent or proper evidence was introduced by Davis to sustain his defense. Over plaintiff's objection, defendant read his evidence as a witness, from a transcript of the evidence in the case of *Dilenbeck v. Davis*, in the superior court of Perry, Iowa, in which this plaintiff was not a party. Plaintiff's objection to the testimony was that the transcript was not proper testimony, not taken in the form of a deposition, not in a manner provided by law, and because the plaintiff was not a party to that suit, and had no opportunity to cross-examine. The evidence was taken, subject to the objection. Appellant has not pointed out to us any authority for so using the transcript, and we think that, under the circumstances of this case, it was not binding on the plaintiff.

2. The evidence sustains the finding of the trial court, that the matter of the validity of the note was adjudicated in the superior court, wherein the court found against Davis, and that the note was valid.

3. Appellant contends that the trial court erroneously entered in the judgment \$3.56 for protest fee, for that the note itself and the endorsement waive presentment for payment, notice of nonpayment, and protest, and notice of protest. He also contends that the amount of the judgment is too large, because the interest was erroneously figured. Plaintiff, appellee, attempts to meet this by say-

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ERROR: erroneous taxation
of interest.

ing that there was no exception to the final judgment and decree, and that no motion was made in the district court to correct the error, if any, in the amount of the judgment, protest, or attorney's fees, and that said questions were not otherwise raised in the district court. As to the first proposition, in regard to the exception, they cite Code Section 3751. See, also, Code Section 3749. This is an equitable action, and triable *de novo* in this court, and the rule is that no exception is required in such a case. *Dicken v. Morgan*, 59 Iowa 157. But we said in *Gould v. Morrow*, 153 Iowa 461, 467, that, if anything more is involved than the question of which party is entitled to recover upon the facts and issues joined, exceptions must be taken. The point now under consideration does not pertain to the right of recovery by either party, but to the amount of the judgment only.

We think the point is well taken as to the protest fee, and it may be as to the amount of interest which appellant claims is erroneously computed; but the question is whether appellant can raise that question here for

3. COSTS: protest fees when protest waived.

the first time, and without having made a motion to correct the amount. Plaintiff cites only Code Sections 4104 and 4105. No cases are cited by appellant on this point. We held, in *Scott v. Chicago, R. I. & P. R. Co.*, 160 Iowa 306, that an appeal may be taken, and questions properly excepted to on the trial may be reviewed without a motion for new trial. But that is not quite the question here, and it is not argued by plaintiff, appellee, that appellant was required to make a motion for new trial. Code Section 4139, which provides, in part, that the Supreme Court may reverse, modify, or affirm the judgment, decree, or order appealed from, or render such as the inferior court should have done, seems to have been in force when the earlier cases, which we shall cite in a moment, were decided, although that section was

not referred to in them. There is no doubt that, in a proper case, a judgment or decree may be modified by this court. But the question before us now is whether a mere mistake or error in computing interest may be raised on appeal, without a motion to correct, in the district court. Upon an examination of the authorities, we find that, under Section 4105, it has been held in several cases that an objection that the judgment is excessive will not be considered, unless a motion has been made in the district court to have the error corrected. *Black v. Boyd*, 52 Iowa 719; *Dickey v. Harmon*, 26 Iowa 501; *Finch v. Billings*, 22 Iowa 228; *Keller v. Jackson*, 58 Iowa 629. In the case of *Keller v. Jackson*, supra, the error was in the computation of interest, which was not called to the attention of the court below. All the foregoing cases were actions at law, except the case of *Finch v. Billings*, supra, which was an action to foreclose a mortgage; and in that case, the claim was that the decree was for more than was claimed. Our first impression was that, this being an equitable action, we could ourselves compute the amount of the interest, and, if too large, reduce it. But under the cases, we see no reason why the same rule should not apply in equitable actions as in law actions. The reason for the statute was discussed in *Pigman v. Denney*, 12 Iowa 396, and quoted with approval by Mr. Justice Deemer in *Belknap v. Belknap*, 154 Iowa 213, at 220. We shall not again quote at length; but the substance of the reason for the statute is that the language of the statute is plain, and that, for a mistake of some ministerial officer, or the court itself, a motion to correct the amount in the lower court may be made, without involving the cost and expense incidental to a trial here. And it was said that many of the cases appealed to this court present only such questions.

We reach the conclusion that appellant may not raise the question here, not having made the motion in the dis-

trict court. In *Dickey v. Harmon*, supra, the judgment was affirmed, but without prejudice to the appellant's right to make a motion in the district court to correct the amount of the judgment. Such will be the ruling in this case.

4. **APPEAL AND ERROR:** remand to correct error.
—*Affirmed.*

LADD, C. J., EVANS and SALINGER, JJ., concur.

EVA L. LADD, Appellant, v. FRANK L. LADD, Appellee.

DIVORCE: Custodial Orders—Modification under Changed Conditions. A custodial order apportioning the custody of a child between the father and mother may, on a showing that, subsequent to the order, the father has deprived himself of any means of properly caring for the child, be so modified as to assign the custody of the child wholly to the mother.

DIVORCE: Custodial Orders—Appealability. Appeal lies from a refusal to modify custodial orders *in re* children, even though no appeal has been taken from the divorce decree.

Appeal from Taylor District Court.—HOMER A. FULLER, Judge.

FEBRUARY 16, 1920.

THIS was an application in the district court to modify provision in a former decree of divorce pertaining to the custody of the child. The application as made was, in effect, denied, and plaintiff has appealed.—*Reversed and remanded.*

Wisdom & Burrell, for appellant.

W. M. Jackson, for appellee.

EVANS, J.—I. On February 20, 1918, the plaintiff obtained a decree of divorce from her husband, defendant, on

the ground of cruel and inhuman treatment. By such decree she was awarded the custody of their only child, Ralph, for 9 months of the year, such custody passing to the defendant for the months of June, July, and August, "as long as said defendant remains a farmer, or keeps said child upon a farm." The boy is 12 years old. On June 22, 1918, the defendant filed an application for a mandatory order, directing the plaintiff to perform the decree, and to give to the defendant the custody of the boy, in accordance with its terms. The allegation of defendant's application was that the plaintiff had refused to the defendant the custody of the boy during the months of June, July, and August. To this application the plaintiff appeared, and denied the allegations set out. She also averred that the defendant had no home into which he could take the boy. At the same time, she filed in her own behalf an application for a modification of this provision of the decree, on the ground of changed conditions since the decree was entered, as contemplated by Code Section 3180. To this application there was no response. These respective applications came on for trial at the same time, on February 19, 1919.

The facts developed by the evidence on the hearing of the application are not greatly in dispute. It appears by the original decree that the plaintiff was allowed \$1,500 of alimony, and the defendant was allowed to retain the 80-acre farm upon which the parties had made their home. That part of the decree which awarded partial custody of the child to the defendant was as follows:

"Except during the months of June, July, and August of each year, during which time, or that during June, July, and August, the said child, Ralph Ladd, to be under the control and custody of the defendant, Frank L. Ladd, as long as said defendant remains a farmer or keeps said child upon a farm, and both the plaintiff and the defendant are

1. DIVORCE: cus-
todial orders: modification under changed conditions.

required to permit each other to visit said child while under the control and custody of either party, during all reasonable times."

As bearing upon defendant's application, it appears that, on two or three occasions, the defendant had taken unwarranted liberties with his former wife, in insisting upon unpleasant conversations with her. On one occasion in May, he had approached her in one of the stores of the town on Saturday afternoon, in the presence of many people, with a persistence that overcame all efforts on her part to avoid him. His right of conversation was predicated upon his assertion that "you are as much my wife as you ever was." He upbraided her with having other affections, and advised her that she was much talked about, and that her good name was affected by such talk. On another occasion, he went to the home of her parents, and entered the house uninvited, and insisted upon similar conversation. She withdrew from him, and went upstairs. After he had withstood polite requests to withdraw from the house, and to desist from his advances toward his former wife, he was peremptorily ordered by the wife's father to leave the premises. This was in June. This is the incident upon which was predicated the allegation that the custody of the boy had been refused to him. Shortly after the entry of the decree of divorce, the defendant sold the farm, and yielded possession. He engaged at once in odd jobs, which took him from one place to another; but he had no home. In April, he was employed as a farm hand by Floyd Groves. Groves was a widower, with two children, a boy and a girl, 12 and 15 years of age, respectively, and without other woman help in his home. He could not furnish to the defendant a home for the boy. The defendant first assumed the attitude in these proceedings that he had arranged with Groves for a home for the boy. This was not true, as later admitted by the defendant. This was the state of affairs when the issues

were made by the pleadings filed. It was clearly true that the defendant had no home to which he could take the boy.

After the decree, the plaintiff and her boy made their home with her parents on a farm. It is undisputed that it is a highly suitable home in which to rear the boy. The defendant continued his services with Groves until the last of July, when it terminated. In the first week of August, he entered into the service of Simpson, in the same capacity. The Simpson family was highly suitable, and defendant had their permission to bring the boy to such home. He was still in the employ of Simpson at the time of the hearing of the application, February 19, 1919. It does not appear that he had any contract of employment for any fixed period. The boy himself was strongly desirous of making his home with his mother, at his grandfather's. The trial court modified the decree, by adding thereto the following provisions:

"It is further ordered that, on the 2d and 4th Friday of each month during the school year, the defendant, Frank L. Ladd, shall have the right to go to the schoolhouse and take the minor, Ralph Ladd, to the home of Eugene Simpson, where the defendant now resides, and keep the said minor child with him until the following Monday morning, when he shall return the said minor to his school.

"It is further ordered that, during the months of June, July, and August, when the defendant has the custody and control of the minor, that, on the afternoon of the second and fourth Friday of each month of June, July, and August, the plaintiff shall have the right to call at the home of the defendant, being the farm home of said Eugene Simpson, and take the minor to her home, and retain him until the following Monday morning, when she shall return the said minor to the home of the said Eugene Simpson."

It will be noted that the foregoing provision can be workable only so long as the defendant continues in the em-

ploy of Simpson. Such employment is subject to termination at any time. Furthermore, the modifications thus made were not asked for by either party. The defendant asked no modification of the original order. The plaintiff alone asked that. The modification made does not respond to her application, but amounts, in effect, to a denial of it. The order in its original form provides for the right of visit at all reasonable times. The defendant has always had abundant opportunity to visit the boy whenever he chose to do so. He did not frequently avail himself of such opportunity. The first question which is presented is whether the conditions have so changed, since the original order was entered, as to bring the case within the provision of Code Section 3180. In the original order, the defendant's right of custody for June, July, and August was qualified by the condition that it should apply only while the defendant remained a farmer. At the time of its entry, the defendant owned the farm home where the boy had been reared. The fair implication of the order was that, in order to be entitled to have the custody of the child, the father must maintain this farm home, or a fair equivalent, into which he could take the boy. We think the later circumstances changed conditions materially, and presented a grave question whether the defendant had any home for the boy, within the contemplation of the decree. Clearly, he had no place for him in June and July, 1918. He could have furnished him board and lodging at Simpson's during the greater part of the month of August. Whether he can do this next June, July, or August can only remain to be seen.

Manifestly, it is highly desirable and for the best interest of this boy that his life be settled in some home under the most favorable circumstances possible. His original home has been wrecked through the wrongful conduct of his father, as adjudicated. So far as his future custody is concerned, his best interest is paramount to any right of

his father to his custody. Upon the record before us, the opportunity open to him to go into his grandfather's home, and become a member of that family, is a providential one, and, in his interest, ought not to be lightly spurned. We do not find in the argument of appellee a suggestion of claim that any interest of the boy will be subserved by breaking his life into sections, nine months and three months, or by his spending these particular three months with his father. The order is defended on the ground that the father has a right to a division of the custody. This is not the criterion upon which judgment herein must be founded.

We reach the conclusion that the plaintiff's application for a modification should have been sustained, and that she should be awarded the continuing custody of the boy until such time as changed circumstances shall make expedient a changed order.

II. The defendant filed a motion to dismiss the appeal. Such motion has been submitted with the case. The general ground of the motion is that there was no appeal from the decree of divorce, and that the decree for alimony was fully performed by the defendant and accepted by the plaintiff; that, having accepted such performance of the decree as was beneficial to her, she cannot now appeal from a part thereof. The motion is not well taken. If it could be sustained on such ground, then no order as to custody of the child could ever be changed, under Code Section 3180, unless there had been an appeal from the decree of the divorce.

The scope and validity of a decree of divorce, as such, is in no manner affected by the order for the custody of the child, nor by future changes in such order. A decree of divorce is such, even though there be no order affecting the custody of the child. It is no less such, if there be an order affecting the custody of the child. The motion is accord-

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todial orders:
appealability.

ingly overruled, and the order of the trial court is reversed and the cause remanded.—*Reversed and remanded.*

WEAVER, C. J., GAYNOR and PRESTON, JJ., concur.

A. W. MARKLEY, Appellee, v. E. A. LOCKWOOD et al., Appellees; J. W. DENBURGER, Appellant.

PARTIES: *Improper Joinder.* Defendant in an action for breach of an executory contract to convey a lot, pleading that the description of said lot was inserted in the contract by mistake of the scrivener, in copying the same erroneous description from a like but independent contract of his immediate grantor, may not implead said immediate grantor on the theory that, if defendant fails to prove the mistake, his immediate grantor is liable over to him.

Appeal from Wayne District Court.—HOMER A. FULLER,
Judge.

FEBRUARY 16, 1920.

ACTION by plaintiff on a bond executed by sureties, and conditioned upon the performance of a contract for the conveyance of real estate by their principal. The failure to convey is alleged as a breach of the condition of the bond. The defense was that such provision of the contract as was not performed had been inserted in the contract by mutual mistake. By cross-petition of the defendant sureties, one Denburger was impleaded as a defendant. The principal or maker of the contract was Heidelbaugh. He, being deceased, was not made a party defendant by the plaintiff. However, his administrator appeared as an intervener, joining with the defendant sureties both in their defense against the plaintiff and in their cross-petition against Denburger. Denburger filed a motion to strike the cross-petition against him, and likewise the petition of in-

tervention, so far as it related to him, on the ground that the alleged cause of action set up by the defendants, as against him, was in no legal sense connected with the subject-matter of the plaintiff's cause of action; that no relief was asked against him except an alternative personal judgment; that he was a resident of Mahaska County, whereas the suit was pending in Wayne County; and that this alleged personal action could be maintained against him only in Mahaska County.

His motions to strike were both overruled, and he has appealed.—*Reversed.*

Thomas J. Bray and *John E. Lake*, for appellant.

Carter & Bracewell and *McGinnis & McGinnis*, for appellees.

EVANS, J.—The history of the transaction between the original parties, leading up to the giving of the bond sued on, is brief. For convenience, we shall refer to Heidelbaugh as though he were the intervener, rather than to his administrator. The plaintiff, Markley, and Heidelbaugh entered into an exchange of property, whereby Markley transferred to Heidelbaugh a certain stock of goods, and whereby Heidelbaugh agreed, by written executory contract, to convey to Markley certain real property, consisting of town lots in the town of Eddyville, Iowa, and certain lands in a certain Section 31, in Mahaska County. The real property so conveyed or intended to be conveyed was held by Heidelbaugh by an equitable title, under an executory contract for a conveyance executed by Denburger, appellant herein. It appears that Denburger held the same property by equitable title under an executory contract with one Myrick. In the settlement between Heidelbaugh and Denburger, Myrick conveyed direct to Heidelbaugh. Thereafter, Heidelbaugh conveyed to the plaintiff, Markley. The

lands were described in the contract to Markley as Lots 2, 3, and 4 of an irregular survey in said Section 31. It is averred, in the petition of intervention of Heidelbaugh, that the inclusion of Lot 4 as a part of the description was a mutual mistake; that it was no part of the property in the contemplation of the parties; that it was entirely disconnected and separated in location from the property in actual contemplation of the parties; that Heidelbaugh did not own nor claim to own Lot 4; that the inclusion of the same in the contract was a mistake on the part of the scrivener; that Lot 4 had been, by mistake, included in the description in the Denburger contract; that, in drawing the Markley contract, the scrivener copied the description from the Denburger contract, and thereby incorporated in the Markley contract the same mistake which had been made in the Denburger contract; that Denburger did not own Lot 4, and did not intend to contract the same to Heidelbaugh, nor did Heidelbaugh intend to purchase the same from Denburger; that said Lot 4 was and is the property of Myrick, and Heidelbaugh neither claimed nor claims any right thereto; that Heidelbaugh did not intend to sell, nor Markley intend to buy, said Lot 4; that the property actually intended to be sold was by Heidelbaugh duly conveyed to Markley, and possession given, and the same was accepted and acquiesced in by Markley for a long time before he set up any claim to Lot 4.

The foregoing is the substance, though not the words, of the petition of intervention. It is in the nature both of a defense and a counterclaim against Markley. The prayer is that the Markley contract be reformed so as to express the true intention of the parties, and that Heidelbaugh and his sureties on the bond be absolved from all liability to Markley by reason of the failure of Heidelbaugh to convey said Lot 4. No relief is prayed as against Denburger, except in the alternative. The prayer as to Denburger is

that, if Heidelbaugh or his sureties are held liable to Markley, then that they have judgment over against Denburger for the same amount of liability so adjudicated.

The allegations of the cross-petition of the sureties as against Denburger are, in substance, the same as the foregoing, except that they plead a want of knowledge or information as to the true facts. The averments of both of these pleadings are consistent, and the parties are represented by the same counsel. We have no occasion, therefore, to differentiate between them. It will be seen that the petition of the plaintiff is at law. The petition of intervention presents an equitable defense, and seeks equitable relief in the reformation of the contract. This may be done in an action at law. The intervener and the sureties will doubtless be entitled to a trial first of the equitable issue thus presented. If they are entitled to equitable relief at all, they are so entitled before the trial at law. It is the contention of Denburger by his motions that he is not and cannot be properly impleaded in this action; that he is an actual resident of Mahaska County, whereas this action is pending in Wayne County; that to implead him is to cause a misjoinder of causes of action.

Of course, if Denburger could be properly impleaded in this suit anywhere, even in Mahaska County, then necessarily he could be impleaded therein wherever it was properly brought by the plaintiff. It follows, also, that, if he could be properly impleaded herein in any form of action, then there is no misjoinder. On the other hand, if it be true that Denburger is not properly impleaded herein, then he is being sued in the wrong county, and the alleged cause of action against him is misjoined with independent causes of action between other parties. So that the real and ultimate question before us goes to the heart of the alleged cause of action against Denburger. Is he properly impleaded herein?

I. If Heidelbaugh had brought an independent action against Denburger, could he, upon the facts alleged in his petition of intervention, have recovered any money judgment or other relief against Denburger? Manifestly not. If he could not, his sureties on the bond to Markley could not. Their right of subrogation, if any, would be a right of subrogation only, and could rise no higher than that of their principal. If the Denburger contract had been an undertaking on his part to carry out Heidelbaugh's contract with Markley, quite a different question would be presented. It was not such. It had been made before the Markley contract was entered into. The mutual rights and liability of Heidelbaugh and Denburger had, therefore, been fixed by their contract before the Markley contract was entered into by Heidelbaugh. What they were then, they necessarily continued to be thereafter, unless there was some subsequent undertaking or conduct on the part of Denburger which created a new liability. No such undertaking or conduct is pleaded. He had nothing to do with the Markley contract.

The intervener concedes that Denburger is in no manner liable to him unless *he* is held liable to Markley. His contention, in substance, is that, if *he* is held liable to Markley for *his* mistake, Denburger should be held liable to him for the same amount for the same mistake. This is a *non sequitur*. Of course, if the intervener proves that Lot 4 was not within the contemplation of himself and Markley in their contract, and that it was incorporated in the description by mistake, that would defeat Markley. In such event, the intervener concedes that Denburger may go hence. But if the intervener should fail to prove the alleged mistake, as between him and Markley, and should, therefore, be held liable in damages, would it follow therefrom, as a matter of law, that the conceded mistake in the Denburger contract was not such? Manifestly not. And

yet the position of the intervener drives him to an affirmative answer to that question. The liability, if any, of Denburger to Heidelbaugh must be predicated upon the mistake in the Denburger contract. That mistake was wholly independent of the Markley contract, and was made before the Markley contract came into existence. The only relation claimed between the two contracts is that, in the drawing of the Markley contract, the scrivener thereof was misled by the mistake in the Denburger contract, and was thereby led into making the same mistake in the Markley contract. Clearly, this inadvertent act on the part of the scrivener did not create a new liability against Denburger.

These two mistakes in these two successive contracts are related to each other only in the sense that the first is a circumstance which may properly be received in evidence on a trial of the issue of the alleged mistake in the second contract. In a trial of the issue between Markley and the intervener, it may be proper to show the mistake in the first contract as explanatory of the circumstance which led to the mistake in the second. While the fact of mistake, if so proven, in the first contract would not be binding, in any legal sense, upon Markley, it would, nevertheless, be admissible in evidence, as explanatory of the circumstances which led to the mistake, if any, in the Markley contract, and as corroborative of testimony for the intervener that the same mutual mistake was made in the Markley contract. In no other sense is there any relation between these two mistakes, or between the Denburger and the Markley transaction.

Needless to say that, if the intervener can show, on a trial between him and Markley, that Lot 4 was not within the contemplation of the parties at the time the contract was entered into, he will have no need of alternative relief. The fact that Heidelbaugh did not own nor expect to own nor claim to own Lot 4 is an important circumstance which

is available to him in making such proof. If it be true that Markley accepted from him a deed which omitted Lot 4, and went into possession under his deed of the other property, and acquiesced for an appreciable time, as averred in his petition, this fact also is available to him as evidence, and as such, would be deemed a persuasive circumstance. On the other hand, if these proofs fail, and it be found that the intervener is entitled to no relief as to Markley, such result could in no manner affect the question of mistake in the Denburger contract.

We deem it clear, therefore, that the alleged cause of action set up against Denburger and the relief sought thereby neither affects the subject-matter of the action nor is affected thereby; nor does it relate to or depend to any degree upon the contract or transaction upon which the action was instituted; nor does it affect the property to which the action relates. *First Nat. Bank v. Dutcher*, 128 Iowa 413; *Farmers & Merchants Bank v. Wood Bros.*, 143 Iowa 635; *Minden Canning Co. v. Hensley*, 149 Iowa 168; *Eller v. Newell*, 159 Iowa 711; *Fulton Bank v. Mathers*, 161 Iowa 634.

It follows that Denburger was not properly impleaded in this suit, and that his motions to dismiss as to him should have been sustained.—*Reversed*.

WEAVER, C. J., PRESTON and SALINGER, JJ., concur.

SARAH ALICE MARREN, Appellee, v. FIDELITY & CASUALTY COMPANY OF NEW YORK, Appellant.

INSURANCE: Partial and Total Disability—Submission of Issues.

Under the terms of a policy providing for *partial* and total disability, the court need not submit the issue of partial disability on evidence which simply shows that the insured might perform some isolated and indefinitely defined duties of his profession.

Appeal from Clinton District Court.—A. P. BARKER, Judge.

FEBRUARY 16, 1920.

THE appellant complains of the refusal of the trial court to submit to the jury the question whether plaintiff had suffered a partial, rather than a total, disability.—*Affirmed.*

J. E. Purcell, A. L. Schuyler, and A. C. Wylie, for appellant.

Wolfe & Wolfe and W. J. Keefe, for appellee.

SALINGER, J.—I. The policy under which plaintiff claims provides for indemnity against total disability "that prevents the assured from performing any and every kind of duty pertaining to his occupation;" also, indemnity for "partial disability that prevents the assured from performing fully work essential to the duties of his occupation." The plaintiff bases her claims upon bodily injuries, said to consist of contusions of the forehead, injuries to the eyes, to the left shoulder, to the wrist, and of erosion and fracture of the knee cartilage. She claims that these, exclusive of any other causes, totally disabled her from performing any and every kind of duty pertaining to her occupation, that of a nurse. The defendant asked the court to submit partial disability. The court declined to do this, and plaintiff recovered as for a total disability. The sole complaint of the appellant is the refusal to submit partial disability, at its request. Such disability was within the range of the pleadings. The sole question on this appeal is whether there was any evidence justifying the submission of such disability. It goes without saying that, if there be any evidence upon which the jury had the right to find partial disability, then it was error not to submit that issue. That is all that is held in *Gainesville & N. W. R. Co. v. Galloway*, 17 Ga. App. 702 (87 S. E. 1093); *Burn-*

ham v. Stone, 101 Cal. 164 (35 Pac. 627); or *Steele v. Crabtree*, 130 Iowa 313.

It is not required that we set out the evidence in detail. It suffices to say that, if the jury believed testimony given by the plaintiff and her witnesses, it was bound to find that an injury to her knee totally disenabled her to perform the duties of a nurse. On the other hand, if one opposing line of testimony were credited instead, then plaintiff was a mere pretender, and had not been disqualified at all to perform any of the duties of her calling,—to say the least, was able to perform all of them substantially. Now, if this were all the evidence, it clearly was not error to refuse submitting partial disability. On this conflict, there was no middle ground, and all that the jury could be asked to say was whether there was total disability or no disability whatever.

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But the defendant had a line of testimony to the effect that plaintiff was able to perform some of the duties of a trained nurse, without definite statement as to what some of these things were. The appellant does not make quite clear what it claims for this testimony. But the possible claims for it have their natural limitations. It either tends to prove partial disability only, or tends to prove or establishes that the disability was total. If it can be held to be proof of partial disability, the court erred in refusing to submit such disability. If, on the other hand, the law holds that a nurse is suffering from total disability even if it is possible for her to perform some isolated duty of a trained nurse, then this testimony was merely cumulative in establishing total disability. If that be held to be its effect, then there was nothing but evidence of total disability, and it would have been error to submit partial disability. In *Lyon v. Railway Passenger Ins. Co.*, 46 Iowa 631, it is, in effect, held that, if there be ability to perform

any of the functions of one's calling, then there is no total disability, within the meaning of indemnity clauses. This case has been sharply assailed in many jurisdictions, and it does seem to proceed on the theory that the policy should be construed strictly against the insured. But we need give this conflict in the case law no consideration. For, while the *Lyon* case does hold that this line of testimony fails to establish a claim under the total disability clause of the policy, it does not hold that such evidence tends to establish "partial disability," as used in indemnity clauses. If the appellant were asserting that there was no right to recover at all, because there had been a failure to prove total disability, and complaining that it was error to submit partial disability, then the *Lyon* case would support such contention. But, as seen, that is not the complaint made. The appellant does not say that the jury had no right to make an award for total disability, but that, while it might make such an award, it should, under the evidence, have been given the opportunity to base a verdict upon partial disability only. So, even if it were conceded that testimony of ability to perform some duties was no evidence of total disability, then the record exhibits one line of evidence which is merely a failure to prove total disability, and two conflicting lines: one tending to show total disability under any definition; another, that plaintiff was shamming, and was entitled to recover nothing. As said before, this affords no basis upon which to recover for partial disability alone, and the court did not err in refusing to submit that issue.—*Affirmed.*

WEAVER, C. J., EVANS and PRESTON, JJ., concur.

KEMRON E. MESSENGER, Appellant, v. **EMMA J. MESSENGER**,
Appellee.

PLEADING: Voluntary Issues. Parties are bound by material, non-
1 paper issues, voluntarily litigated by them.

DIVORCE: Residence—Sufficiency. Residence is not wholly a mat-
2 ter of expressed intention. Acts and conduct must harmonize
with intention. Evidence held sufficient to justify the court in
setting aside a decree, on the grounds of want of residence and
good faith.

APPEAL AND ERROR: Abstract—Questions and Answers. Ques-
3 tions and answers may be of such a nature as to justify a literal
copying of them into the abstract, in order to properly scruti-
nize them.

Appeal from Polk District Court.—J. E. MEYER, Judge.

FEBRUARY 16, 1920.

APPEAL by the plaintiff from an order of the district
court setting aside a decree of divorce previously obtained
by him.—*Affirmed.*

Henry & Henry, for appellant.

Carr, Carr & Cox, for appellee.

EVANS, J.—Plaintiff obtained the decree of divorce on
March 6, 1918, upon service by publication. On May 22,
1918, the defendant wife appeared by filing a petition in the
case, asking that such decree be set aside
on the ground of fraud in obtaining the
same. With her petition the defendant filed
her answer, setting up a complete defense
to the plaintiff's original petition. The trial court sus-
tained the petition, and set aside the decree.

The reason assigned by the court for setting aside the
decree was that such decree had been entered without juris-

1. PLEADING:
voluntary is-
sues.

• diction, in that the plaintiff was not a resident of Iowa at the time he brought his suit, or at the time of obtaining the decree.

Two grounds of reversal are pressed upon our attention by appellant:

(1) That there was no allegation in the application to set aside the decree which denied or challenged the alleged residence of plaintiff in Iowa, and that the court erred in sustaining the petition on a ground not presented therein.

(2) That there was jurisdiction to enter such decree, in that the plaintiff was, in fact, a resident of the state, as disclosed by the evidence at the hearing, and that the court erred in its finding otherwise.

I. As to the pleadings, it is to be said that the petition to set aside the decree and to grant a new trial did not, in terms, allege that the plaintiff was not a resident of the state. With her petition, however, the defendant filed her answer to plaintiff's petition for divorce. This answer presented complete defenses to such petition. One of these defenses was that the plaintiff was not, and never had been, a resident of the city of Des Moines. She denied, also, that he had brought the action in good faith.

In support of her application to set aside the decree, it was necessary for the defendant to show *prima facie* a good defense. The application itself was predicated, in terms, upon the ground of fraud. It charged broadly that the decree of divorce had been fraudulently obtained.

Though we assume that evidence on the question of plaintiff's residence was not admissible at the hearing of the application, for want of issue tendered therein on such question, yet no objection to such evidence was made. On the contrary, the plaintiff, in the introduction of testimony, went into the question voluntarily and fully. Furthermore, the record discloses that, some time before the defendant's

application was reached for trial, the plaintiff filed in the cause the following motion:

"Now comes the plaintiff, Kemron E. Messenger, and by his counsel, and moves the court to set this case down for hearing at some definite day during this term of court, and that said cause be heard upon affidavits or oral testimony, as the court may determine, upon the following grounds:

"1. The plaintiff is at present engaged in business at the city of Lincoln, in the state of Nebraska, and his counsel is unable to proceed with the trial of this case at this time without the presence of his client.

"2. The issue before the court is one of fact, and cannot be met without testimony.

"3. The defendant's counsel has informed the plaintiff's counsel that this court has no jurisdiction in this case, as the plaintiff was a nonresident of the state of Iowa at the time the decree was granted in this case.

"4. The plaintiff's counsel cannot safely proceed with the trial of this case at this time, without the presence of his client; for the client alone knows his place of residence.

"5. If the hearing of this case is passed until some day of the following week, the plaintiff's presence can be secured."

Pursuant to this motion, plaintiff was given opportunity to be present at the hearing, and he was present. The evidence on the question of residence was principally that of plaintiff himself, as a witness, under the examination of his own counsel. The only other witnesses testifying on such question were those produced by the plaintiff in his own behalf.

Regardless, therefore, of the allegations of defendant's application, or the absence of allegation therein, the record clearly discloses that the parties tried the question of residence as a volunteer issue, without raising any question as

to the scope of the pleadings or as to the admissibility of the testimony. This objection made here was not made in any form in the trial court. The objection, therefore, comes too late.

II. The evidence in the case bearing upon the question of plaintiff's residence in the state bears also on the question of his good faith in claiming such residence, and in predicated his action for divorce thereon.

2. Divorce: residence: sufficiency.

The parties were married in 1895. They lived together as husband and wife until April 4, 1909. Their home at that time was near Denver, Colorado. It is averred by plaintiff that defendant deserted him at that time. It is averred by defendant that the plaintiff deserted her at that time. Both parties charged cruel and inhuman treatment. The fruit of the marriage was a little girl, seven years of age, and a little son, deceased. After the separation, the defendant continued to live in the same home, and so continued ever since. The plaintiff took up a business that has taken him into many states. There is a sense in which he has had no abiding place anywhere. For the last five years, he had been in the employ of Wood Brothers Thresher Company, and went wherever he was sent by his employers. On December 28, 1916, he became sales manager, with headquarters at Des Moines. His work, however, kept him out of the city on the road, most of his time. While in Des Moines, he lived at the Elliott Hotel. For about three years prior, he had kept a trunk at this hotel. We infer that he had used a room there whenever he was in the city. For the last two years prior to December 28, 1916, he had spent most of his time in Minnesota, and had claimed a residence and voted there. It was during this period of time that he had kept a trunk at the Elliott Hotel.

During the entire period of separation, he had supported his wife and child by regular remittances. He had at all

times maintained his bank account at Denver. His remittances to his wife were always made by check on the Denver bank. In January, 1915, he made her a brief visit. In October, 1917, while in Denver, he phoned the residence, and made an appointment with his daughter, pursuant to which she visited him down town. On October 30, 1917, he wrote his wife the following letter:

. "Des Moines, Iowa, Oct. 30th, 1917.

"Jean: About three years ago we had some correspondence on the question of a divorce. Nothing came of the matter at that time, however, I thought and still think it is the proper thing to do. Now it is a question of which one brings the suit. If you prefer to be the plaintiff in this matter, I will not resist except as to the question of alimony; and, that can I hope be arranged mutually. But it must be understood that the amount will not be what I have been sending you in time past. After January 1st, I will be out of a job, as my contract with Wood Bros. expires Dec. 31st, and my health will not permit me to continue the work. It is my understanding that Wood Bros. have the man selected to take my place. I gave them notice on July 4th, that I would not continue after my present contract expired. This matter does not call for any bitterness on the part of either of us. It is the sensible thing to do. We have had bitterness enough in time past. Think the matter over and write me.

"Yours truly, K. E. Messenger."

This letter was answered by the wife, with the following notation thereon:

"If you care to take action in this matter, better refer it to your attorney."

On November 30, 1917, he left Des Moines for Lincoln, Nebraska, to take charge of his firm's business there. According to his testimony, the purpose of his going was at first temporary, but afterwards became permanent. He has

continued to live at Lincoln since that time. While staying at Lincoln, he began this action for divorce, on January 2, 1918. He averred, in substance, that he had resided in the city of Des Moines for one year last past, after deducting all absences therefrom. Without doubt, he intentionally withheld from his wife all knowledge of the proceeding. After obtaining the decree, he promptly wrote to her, advising her of his success in that regard, and, in effect, that her dependence upon him was at an end. The decree obtained awarded no alimony. It is alleged in the answer that the plaintiff had property to the value of \$75,000. He was receiving a salary of \$3,000. There is no suggestion in the letter to his wife that he had changed his residence from Colorado. So far as appears from the record, he was personally present in Colorado as often as he was in any state. By his letter, he asked that the question of alimony "be arranged mutually."

The letter as a whole clearly implied an assurance that whatever he did in the matter of a divorce should be done openly and honorably, and not clandestinely and dishonorably. If vigilant prudence required the defendant to watch the docket of Polk County, while plaintiff lived in Des Moines, the letter of plaintiff was calculated to relieve such tension, and to allay watchfulness. Still less was there any prudent reason for the defendant to watch the Polk County dockets after the plaintiff had removed to Lincoln; and yet the plaintiff had left Des Moines, never, in fact, to return, more than 30 days before he began his suit. The total period of his stay in Des Moines was 11 months, without counting his many absences therefrom. The next day after he obtained his decree, his trunk was shipped to Lincoln.

It is to be conceded that the question of acquiring a residence is, to a large extent, a question of intention on the part of the alleged resident. But such intention must be

bona fide. Only the plaintiff himself can testify directly to such intention. The courts, too, are inclined to deal liberally with the claimant of a residence, on the theory that he can have but one, and is entitled to make his own choice. But this does not eliminate the question of the good faith of his intention. Where, as here, it becomes highly advantageous to a claimant temporarily to feign an intention to become a resident for only a brief time, in order to accomplish other ends, his claim of intention will be scrutinized and weighed like any other evidence, in the light of his conduct and all the circumstances surrounding it.

We reach the conclusion that the evidence in this record justified the finding of the trial court on the question of residence.

III. The appellant has filed a motion to strike the amended abstract of the appellee, on the ground that it has added nothing material to the record. The examination of the plaintiff as a witness is set forth in full by question and answer in the amended abstract. The matters inquired about bore almost wholly upon the question of motive and intent on the part of the plaintiff. We think that the setting forth of his evidence by question and answer was an aid to the proper scrutiny of it, and, therefore, that the filing of the amended abstract is not subject to complaint. The order of the trial court will be—*Affirmed.*

3. APPEAL AND
ERROR: ab-
stract: ques-
tions and an-
swers.

WEAVER, C. J., PRESTON and SALINGER, JJ., concur.

JOHN MYER, Appellant, v. W. H. GRAY, Appellee.

ARBITRATION AND AWARD: Common-Law Submission—Effect.

An award under a common-law submission may be confirmed and enforced by judgment.

Appeal from Monona District Court.—W. G. SEARS, Judge.

FEBRUARY 16, 1920.

SUIT in equity to adjudicate and enforce a written award of arbitrators under a common-law arbitration. The answer was, in substance, a general denial. The trial court dismissed the petition, and taxed the costs equally to each party. The plaintiff has appealed.—*Reversed.*

Prichard & Prichard, for appellant.

T. B. Lutz & Son, for appellee.

EVANS, J.—We have no argument for the appellee. Upon the record presented by appellant, it is made to appear that there was pending and in course of trial in the district court an action between the parties hereto. Thereupon, the parties orally agreed to submit their whole controversy to certain designated arbitrators. Pursuant to this agreement, the trial was stopped, and the cause dismissed. The arbitrators presented a written award. The controversy involved the question of drainage rights and the casting of surface water. The parties were adjoining landowners, with an east and west highway between them. The general course of the flow of surface water is from northwesterly to southeasterly. The plaintiff owns the land on the north, and defendant, that on the south, his land being the servient land. The defendant had maintained a dike along his north line. It was claimed by the plaintiff that this interfered with the natural flow of surface water from his land.

It appears, also, that, some years prior, an arrangement had been entered into between the defendant and Elmore, grantor of the plaintiff, whereby an open ditch was constructed upon defendant's land by the mutual co-operation of the parties, the purpose of which was to carry the surface water off from the defendant's land. This ditch suffered more or less interference by the establishment of a

railroad right of way; and, at the time of the arbitration, it had become clogged, to such an extent as to be of little, if any, efficiency. We infer, also, that their then controversy involved the question whether Myer, the plaintiff, was conducting water towards and upon the defendant's land which did not flow in such direction in its natural course.

The written finding of the arbitrators was as follows:

“Award of Arbitrators.

“The undersigned arbitrators, who were duly chosen by the respective parties hereto, to examine and determine the controversy between the respective parties regarding the ditching and diking and drainage of their respective lands and the control of the water in the public highway ditches running along and through their respective lands, to wit, the southeast quarter of Section 33, Township 85, Range 43, Maple Township, belonging to John Myer, and the northeast quarter of the northwest quarter and the north half and northeast quarter of Section 4, Township 84, Range 43, Center Township, belonging to W. H. Gray, do hereby make the following award:

“(1) We advise that the present tile drainage culvert in the public highway which runs north and south between the lands of said John Myer and one Leonard Gray at the north end of said highway remain as it now is, and require that John Myer construct a drainage ditch across the corner where said road turns south, commencing at the present ditch and at south end of said tile culvert and cutting across the corner of said Myer's land diagonally 134 feet to the highway ditch on east side of said highway; thence running south to and across the public highway running east and west to the north line of said Wm. H. Gray's said land and connecting with the drainage ditch running east and west on the south side of said highway.

“That the said Myer is required to open and clean out

said ditch running along the east side of the public highway running north and south between this land and the land of Leonard Gray, to wit, east half of the southwest quarter of said Section 33, and be permitted to use the dirt from said ditch in making a dike along his said line fence and east of said ditch and highway, running to the north line of said Wm. H. Gray's land and connecting with the ditch to be constructed by the said Wm. H. Gray at the north line of said Wm. H. Gray's land as aforesaid, but the said Myer is not to make or construct the said dike to any greater height than the grade of the public highway.

"(2) The said Wm. H. Gray is permitted to open up and clean out the ditch on the south side of the public highway running east and west along the north line of said Gray's land and permitted to use the dirt from said ditch in repairing and maintaining his certain dike already constructed by him along the north line of his said premises; but said Gray is not to make or construct said dike to any greater height than the said public highway. The said ditch is to run east to a point east of the public highway, connecting with the road ditch running south along the line of said Myer aforesaid. The said Gray is to construct a ditch running diagonally and in a southeasterly direction 250 feet to the contract ditch hereafter set out, and use the dirt from said ditch in constructing a dike along the south and west sides of said diagonal 250-foot ditch, and ending at said contract ditch at a point 300 feet southwest from the north line of said Wm. H. Gray.

"(3) That said contract ditch as established by Helen Elmore and said Wm. H. Gray by agreement in relation thereto, dated May 1, 1905, and recorded on the 4th day of May, A. D. 1905, in Book F of Miscellaneous Monona County Records, on page 585, is to be opened up by the respective parties and maintained as set forth in said agreement, except that said Myer is only required to open said ditch

commencing at his south line and running north to a distance 40 rods, and the said Wm. H. Gray is to open up said ditch to the south line of his said premises. The said Myer is to put in the bridge across said ditch where it crosses the private way of said Gray leading to and across said railroad right of way, all as provided in said agreement on the part of Helen Elmore.

“The arbitrators attach hereto a plat of said drainage, ditching, and diking, also a copy of said recorded agreement, and make them a part hereof.

“Dated at Mapleton, Iowa, this 14th day of March, 1914.”

[Duly signed.]

Both parties were witnesses at the trial herein in the district court. They both agreed that there was an oral agreement of arbitration, and that the foregoing written award was rendered pursuant thereto. The award is, therefore, binding as between them, as a common-law award. Being such, either party was entitled to adjudicate it, and to enforce it by appropriate action. *Foust v. Hastings*, 66 Iowa 522; *Love v. Burns*, 35 Iowa 150; *Conger v. Dean*, 3 Iowa 463; *Fink v. Fink*, 8 Iowa 313; *Zook v. Spray*, 38 Iowa 273; *McKinnis v. Freeman*, 38 Iowa 364; *Thornton v. McCormick*, 75 Iowa 285; *Wilkinson v. Prichard*, 145 Iowa 65.

The reason for the dismissal of plaintiff's petition is not disclosed in the record before us. Nor can we discover from such record any reason why the award of arbitration should not be deemed fully proved, and entitled to the sanction of a decree accordingly.

Upon the record, the plaintiff is entitled to a decree adjudicating the rights of the parties strictly in accord with the written award made, and above set forth. Being entitled to such decree, he is, of course, entitled to appropriate

methods of its enforcement. We do not think that the nature of the issues is such as to include any question of damages. The judgment dismissing the petition will, therefore, be reversed, and a decree ordered finding the rights of the parties in conformity with the written award of the arbitrators, with leave to either party to move either for a decree in this court or for a remand for such purpose to the district court.—*Reversed.*

WEAVER, C. J., PRESTON and SALINGER, JJ., concur.

ORCUTT COMPANY, Appellee, v. J. F. SCHLAPPI, Appellant,
et al., Appellees.

MECHANICS' LIEN: Right to Lien—Perfecting of Lien by Materialman. Where an owner has knowledge that materials were furnished on credit, or has knowledge of such circumstances as would put him on inquiry, and where payment was not made strictly in accordance with the terms of the contract, the materialman had the right, under the law, to perfect his lien by complying with the statute.

APPEAL AND ERROR: Reservation of Grounds—Constitutional Questions Not Raised Below. A constitutional question may not be raised for the first time in the Supreme Court.

Appeal from Woodbury District Court.—JOHN W. ANDERSON, Judge.

OCTOBER 25, 1919.

REHEARING DENIED FEBRUARY 16, 1920.

SEVERAL actions in equity to establish and foreclose mechanics' liens were consolidated and tried together. The principal controversy now is between the owner, Schlappi, who is the appellant, and Superior Lumber & Coal Company, as to whether said lumber company is entitled to a

lien. The trial court found against the owner, and established the lumber company's lien, and entered a decree accordingly. A further statement of the facts will be given in the opinion. The owner, Schlappi, appeals.—*Affirmed.*

Carter, Brackney & Carter, for appellant.

Milohrist, Scott & Pitken, Jepson & Stecker, O. D. Nickle, Pendleton & Wakefield, and C. L. Joy, for appellees.

PRESTON, J.—1. The Orcutt Company seems to have commenced the first action, making the owner, the contractor, subcontractors, other lien holders, etc., parties defendant. Other cases were consolidated, the pleadings reformed, and the issue now arises on the cross-petition of the defendant lumber company. Some of the cases have been settled; and, as said, the principal controversy now is between the owner and the lumber company. There was a stipulation as to other defendants who were claiming liens, and providing for decree as to them, in case the lumber company is found entitled to a lien at all. Arp is the principal contractor. On May 5, 1913, Schlappi, the owner, entered into a contract with Arp, by which Arp was to furnish the materials and build certain dwellings on different lots for the sum of \$14,450. There was a written contract between them, and appellant claims, also, that the contract was partly in parol, and that the verbal part was in reference to the roofs on some of the houses on Pierce Street, and that it was also agreed that the owner should let Arp have certain sums of money before they were due, according to the written contract, if Arp should need the money. The writing provided that \$1,000 should be paid when the contract was signed; \$2,000 on completion of the foundations of the Twenty-third Street houses; \$1,000 on completion of the foundations of the Pearl Street house; \$2,000 on comple-

1. MECHANICS'
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tion of the brick walls of the Twenty-third Street houses; \$1,000 on completion of the brick walls on the Pearl Street house; \$1,000 on completion of the roofs on Twenty-third Street houses; \$1,000 on completion of the roof of the Pearl Street house; \$1,000 on completion of the plastering of the Twenty-third Street houses; \$1,000 on completion of the plastering of the Pearl Street house; and the balance \$2,450. 10 days after the satisfactory completion and acceptance of the buildings. No right was reserved in the contract to the owner to pay materialmen or subcontractors: that is, the contract did not provide that he should do so. The cross-petition of the lumber company alleges, in substance, that, about May 12, 1913, it entered into a parol contract with the contractor, Arp, to furnish building materials, to be used in the erection of three dwelling houses on one of the lots before referred to, and that, about June 11, 1913, it entered into another parol contract with him to furnish materials for the erection of another of the buildings before referred to, and on another lot; that, under said contracts, it furnished lumber and building material, set out in schedules attached; that the last item furnished under one of said schedules was October 31, 1913, and the last item in the other was furnished on the 7th of November, 1913; that, on November 11, 1913, it duly filed with the clerk its statements and claims for mechanics' liens, and on that day caused to be served on defendant Schlappi notices of its claim in due form; that there was due it from said Arp, on account of lumber and material so furnished for all the houses, \$4,903.78, with interest; that, during all the time it was furnishing said lumber and materials, the owner, Schlappi, had knowledge that it was so furnishing the same, and that the same were being purchased on credit, and were not paid for. Defendant Schlappi, in answer to the foregoing cross-petition, denied that the lumber and materials was delivered on the premises, and says that, if said goods were sold to de-

fendant, they were sold upon open account, and not for use in the buildings; denied that the prices charged were the agreed prices; alleged that he paid the principal contractor, strictly in accordance with the terms of said contract, which fact was known to the lumber company, that the work had not been completed on the buildings until the total sum of \$11,000 was due Arp under the terms of the contract, and that said payments had been made, and that no other sum ever became due to Arp, that said Arp abandoned said contract, and said defendant subsequently completed the buildings at the expense of \$3,200; denied that the prices charged were the fair and reasonable prices; and alleged that the lumber company knew that defendant was paying the contractor in accordance with the terms of the contract, and made no objection thereto, and that, therefore, it was estopped from claiming that the owner had no right to make the payments. The case was sent to a referee, to hear the testimony and make findings of fact. Exceptions to the report of the referee were filed by appellant, together with requests for other findings of fact, which exceptions were overruled by the court, and the report of the referee was approved and confirmed; and the court held that, under the law and the facts so found, the lumber company was entitled to judgment and to a mechanics' lien. Decree was entered accordingly, and appellant's motion to strike was overruled. The court also rendered a personal judgment against Arp, and in favor of appellant, on appellant's cross-petition against Arp, for \$7,719.37, and in this is involved the amount which the court required appellant to pay the lumber company.

There are several disputed questions of fact, among them whether the lumber company delivered the materials on the premises; whether certain conceded duplications of doors were fraudulent; whether the lumber and materials were sold at the market price, or reasonable value without a

contract, or whether there was a contract, and further, what the terms of the contract were, if there was one; whether there was a change of the plans, in order that there might be a charge for extras; whether Schlappi knew that Arp was buying material from the lumber company, and whether he was buying it on credit, or had knowledge of such circumstances as to put him upon inquiry; whether payments made by Schlappi to Arp were in accordance with the terms of the contract. There may be some other minor disputed points.

Appellant has assigned errors in regard to these several matters. The facts found by the referee, and confirmed by the trial court, stated as briefly as may be, are that the contract of May 5th was entered into as alleged; that it was partly in writing and partly oral; that the written portion provided, in part, that the buildings were to be constructed according to plans and verbal agreements and specifications, and the written portion also fixes the time of payment; that, immediately after said contract was made, Arp started to construct the buildings in substantial compliance with the terms of the contract, and completed the foundations, brick walls, roofs, plastering, and casing of the houses on Twenty-third Street, and completed the foundations, brick walls, and roof of the Pearl Street house; and that, under the terms of the written portion of the contract, he was entitled to \$11,000 of the contract price; that Schlappi paid Arp certain moneys by check, some of which were according to the terms of the contract; that several of these checks were endorsed over by Arp to the materialmen; that Arp entered into a verbal contract with the lumber company, at about the time alleged, to furnish the lumber and material for the construction of the buildings; that there were no definite prices agreed upon between Arp and the lumber company at this time; that Arp had been dealing with the lumber company for some time previous, and there had been a gen-

eral understanding that Arp was to be charged prices that would yield the lumber company 10 per cent profit over and above the invoice price at the Sioux City office, and a reasonable margin for doing business, and delivery of material; that, while there was no set price of the amount to be charged, it was understood that the price would be the same as they had charged Arp theretofore, which was practically 10 per cent above the cost of material delivered on the job; and that this was after Arp had furnished the lumber company with a list of material for the buildings to be erected; and that the charges were so made; and that the prices charged were the fair and reasonable market value of the material furnished, and set out in the mechanics' lien statement; that Arp purchased all his material on credit; that payments were made by Schlappi to Arp from time to time under the contract, but not in strict conformity to the contract; that Schlappi knew at all times that the lumber company was furnishing lumber and material for the construction of the buildings, and knew, or had reasonable ground to believe, that Arp was procuring the material on credit; that Arp proceeded with the construction in substantial compliance with the terms of the contract until about September 15th, when he practically abandoned the contract, and, after that time, the work proceeded slowly until in November, when he entirely abandoned the contract, without having finished all the houses; that, about November 14th, and again on December 1, 1913, Schlappi notified Arp to proceed to complete the buildings, or that he (Schlappi) would proceed to complete the buildings; that Schlappi did thereafter employ another contractor, and Schlappi paid such contractor \$3,178.01 for said work; and that such expenditures were reasonable and necessary; that, when Arp abandoned the contract, Schlappi had a balance of \$2,300 of the contract price on hand, with which to complete the buildings, and that it cost the owner the additional sum afore-

said, or \$878.01 more than the balance to be paid under the contract. As to the claim of Arp against Schlappi, the referee found that Arp was not entitled to extras, and that, because of payments by Schlappi to him, Arp was not entitled to recover anything from Schlappi; that the lumber company filed its claim with the clerk and notified Schlappi, as alleged; that the material was delivered on the respective premises, as alleged; that the duplications were made by mistake, and were not fraudulent, and the amount was deducted from the claim of the lumber company; that the date of furnishing the last item of material under the contract of May 12, was October 31, 1913, and that the fair, reasonable market value of the material so delivered under that contract was \$4,370.10, and that thereon Schlappi paid to the lumber company \$1,500, September 8, 1913, leaving a balance under the contract of \$2,870.10; that the last item under the contract of June 11th was as before stated, and the value of the material delivered thereunder is \$1,665.78, and that said two balances or sums are due the lumber company. As to the knowledge of Schlappi, it was found that he knew that the lumber company was delivering the lumber and material when they commenced making delivery to the buildings, and that defendant admitted in his testimony that, so far as he knew, Arp purchased all the material for the buildings from the lumber company; that, about August 23, 1913, he heard rumors with reference to the financial standing of Arp, and that, on that date, he had a conversation with the manager of the lumber company, and Mr. Schlappi was then advised that Arp had paid nothing to the lumber company; that a statement of said account was furnished to Schlappi about September 1, 1913; that, at the time said account was rendered, Schlappi had paid to Arp, upon his contract, the sum of \$8,500, leaving a balance due on said contract at that time of \$5,950; that thereafter, Schlappi made the following payments upon the contract:

September 6th, \$1,500 to lumber company; September 6th, \$500 to brick and tile company; September 13th, \$400 for labor; September 15th, \$300 to Haakinson & Beatty; September 15th, \$50 to brick mason; September 15th, \$50 to brick mason; October 4th, \$250 for labor; October 18th, \$500 to brick and tile company. That, after September 1st, the lumber company took to the house on one lot, material amounting to \$940.05, and to another of the houses in the sum of \$662.78, or a total of \$1,602.83. It was further found that Schlappi was required to expend the sum before stated, to complete the buildings. The contract between Arp and Schlappi provided that the houses were to be completed by September 1, 1913, and it was found that one of the houses was not completed until February, 1914, and that the rental value of that house from September 1, 1913, to March 1, 1914, was \$90 a month.

The amount of Hansen's claim, as found by the referee, is \$166.99, with interest, and the amount of the claim of Comoli is \$120. These are junior lien holders, and the stipulation in reference thereto has before been referred to. The evidence sustains the findings of the referee and the trial court. It would serve no useful purpose to set out the evidence of the different witnesses, and conflicting statements. On such findings of fact, the law question is as to whether thereunder the owner had the right to make payments to the principal contractor, in accordance with the terms of his contract, or whether the materialman is entitled to a lien, where the owner has knowledge that the materials were furnished on credit, or has knowledge of such circumstances as to put him upon inquiry, and where the payments are not made strictly according to the terms of the contract. This we conceive to be the real point of difference between the counsel on either side. Appellant contends that the case comes within the rule of a line of cases such as *Stewart & Hayden v. Wright*, 52 Iowa 335, and they

cite that case and other similar later cases. An earlier case is cited by appellant, *Kilbourne, J. & Co. v. Jennings & Co.*, 38 Iowa 533, to the point that the contract between the owner and contractor is binding, and that the owner is not liable beyond the terms of his contract. But the point in that case was whether the owner could be compelled to pay in money when he had agreed to pay in property. In the *Stewart* case, *supra*, there was evidence to support the defendant's answer, which alleged that she had no notice or knowledge of any arrangements made by the principal contractor for labor or materials, and that, under the contract, the principal contractor proceeded with the construction of the house; and while the same was in course of construction, she (the owner), in good faith, and without any notice or knowledge that the principal contractor had incurred or was incurring debts for materials or labor, and without any knowledge of the claims of the plaintiff, and before any notices were served upon her, paid to the principal contractor installments, as the work progressed, and in compliance with the contract. It was held that, under such circumstances, the payments protected the owner. Appellant also cites *Epeneter v. Montgomery County*, 98 Iowa 159; *Fullerton Lbr. Co. v. Osborn*, 72 Iowa 472, 475; *Page & Son v. Grant*, 127 Iowa 249; *Iowa Stone Co. v. Crissman*, 112 Iowa 122; *Slagle & Co. v. De Gooyer*, 115 Iowa 401; *Chicago Lbr. & C. Co. v. Garmer*, 132 Iowa 282; *Jones & M. Lbr. Co. v. Murphy*, 64 Iowa 165; and other cases. The *Jones v. Murphy* case, *supra*, is also cited by appellees. We shall not again review these cases. Some of them are reviewed in *Cedar Rapids S. & D. Co. v. Heinbaugh*, 183 Iowa 1236. We may say, however, that some of these cases seem to be against appellant's contention. In *Page v. Grant*, *supra*, it was held that the owner is not always justified in paying the principal contractor, even in strict accordance with the contract, and that, by failing to observe his original contract as

to the time of payment, or to follow the law as to the rights of subcontractors, he may be liable for more than the original contract price. And in *Chicago Lbr. Co. v. Garmer*, supra, payments were made in accordance with the terms of the contract, but the owner had knowledge that the materialman was furnishing material, and the court said that, if the owner was aware of this, the law seems to be well settled that payment to the contractor will not constitute a defense. These last two cases are discussed in the *Cedar Rapids S. & D. Co.* case.

On the other hand, appellees rely on a line of cases commencing with *Winter & Co. v. Hudson*, 54 Iowa 336, where, as here, the statement and notice were given to the owner within the time required by law; payments were not made in strict accordance with the terms of the contract, nor were the buildings completed within the contract time; the defendant had knowledge that the materials had been furnished and used in the construction of the buildings; and it was held that the owner was liable to the subcontractor, though full payment had been made to the principal contractor. The *Stewart & Hayden* case was referred to, and the distinction pointed out. Appellees cite, also, *Gilchrist v. Anderson*, 59 Iowa 274. In that case, the facts are, we think, more favorable to appellant than are the facts in the instant case; for that, though the owner knew the contractor had to buy the lumber of someone, he did not know that he bought it from the defendant. In that case, the owner did not know that the contractor bought on credit of anyone until near the expiration of 30 days from the time the last lumber was furnished, when written notice was served. It was held that that case fell more nearly under the rule of *Winter v. Hudson*, supra, and it was said:

"The test question is as to whether Anderson [the owner] could probably, in the exercise of reasonable diligence,

have discovered that the plaintiffs were entitled to a lien. We have to say that it appears to us that he could."

It was held that he should have pursued the inquiry suggested, and that the subcontractor was entitled to a lien. In the instant case, appellant knew that appellees had the right, under the law, to perfect their lien by complying with the statute, which they did in due time. Without further discussion, we think the instant case comes within the rule of the cases cited by appellees, before referred to, and the following: *Fay & Co. v. Orison*, 60 Iowa 136; *Andrews v. Burdick*, 62 Iowa 714; *Jones v. Murphy*, supra; *Othmer Bros. v. Clifton*, 69 Iowa 656; *Hug v. Hintrager*, 80 Iowa 359, 360; *Green Bay Lbr. Co. v. Adams*, 107 Iowa 672; *Page v. Grant*, supra; *Chicago Lbr. Co. v. Garmer*, supra; *Whceler v. White*, 164 Iowa 495; *Cedar Rapids S. & D. Co. v. Heinbaugh*, supra.

2. A constitutional question is argued by appellant. Code Section 3093 was amended, or rather repealed, and a new section enacted in lieu thereof, which new statute went into effect July 4, 1913, about two months after the contract between Schlappi and Arp was made, and after the lumber company started to deliver material. It is argued by appellant that the new statute does not govern this case, and they cite certain provisions of the Federal and state Constitutions, and a number of cases are cited. The new statute seems to make the owner liable for any payments made to the original contractor before the lapse of the 30 days allowed by law, for the filing of subcontractors' mechanics' liens. It is stated by appellant, in argument, that no question was raised in the trial court but that this case was governed by the law as it stood under the prior statute. We do not find that the constitutional question was raised by either party in the court below. This being so, it may not be raised in civil

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cases for the first time here. *State v. Ross*, 186 Iowa 802. Furthermore, we do not understand appellee to contend otherwise. All they say in argument on this point is in the reply argument, where they say that an examination of appellant's case shows that, so far as the extent of the lien is concerned, the new act did not change the law as it previously existed, and that changes in the new law were administrative in their character, and deferred the time when action might be begun for the debt. We have decided the case without regard to the new statute, and we do not decide anything in regard to the new statute.

The judgment and decree of the district court is affirmed, and the liens of the subcontractors will be established in accordance with the stipulation. There was a motion filed by appellant to strike the amended abstract, and also a motion to strike appellees' argument and parts of the reply argument. These motions are overruled.—*Affirmed*.

LADD, C. J., EVANS and SALINGER, JJ., concur.

J. R. SELKIRK, Appellant, v. SIOUX CITY GAS & ELECTRIC COMPANY, Appellee.

MUNICIPAL CORPORATIONS: Public Utilities—Rates. A heat, gas, electric light or power, or water franchise, duly approved by the electors, is at all times under the control of the city council, in so far as a reasonable upward or downward revision of the rates is concerned.

Appeal from Woodbury District Court.—W. G. SEARS, Judge.

FEBRUARY 16, 1920.

ACTION in equity by plaintiff, on behalf of himself and other gas consumers, to enjoin defendant from putting into

effect and collecting increased rates for gas, under an amended or new ordinance, contrary to the rates fixed in the ordinance granting the franchise in 1902, which franchise ordinance, the defendant contends, was repealed as to rates by the new or amended ordinance. There was a demurrer to the petition, which was sustained; and, plaintiff electing to stand thereon, the petition was dismissed, and judgment rendered against plaintiff for costs. Plaintiff appeals.—*Affirmed.*

J. L. Kennedy, for appellant.

Jepson & Struble, for appellee.

PRESTON, J.—We think the questions presented have been heretofore determined, and we shall, therefore, attempt to avoid repetition of the discussion and reasoning in prior cases. But two questions are relied upon by appellant: First, that the original ordinance constitutes a binding contract upon the defendant; and, second, that the new ordinance amends the old one, and that this could not be done, because the ordinance was not submitted to a vote of the electors. Appellee contends, among other things, that, even though the original franchise ordinance and its acceptance by defendant do constitute a contract, it may, nevertheless, be changed by mutual agreement of the parties thereto, the city and the defendant, and that this has been done by the new ordinance. The first ordinance, No. F-7011, was passed July 7, 1903, and was to run 25 years, and was thereafter approved by the voters. It provides, among other things:

"Section 4. In consideration of the rights and privileges herein granted, the said grantee, and its assigns, agree to accept this grant subject to the further consideration that during the life of this franchise the prices, which may be charged for gas furnished private consumers, shall not

exceed the following amounts: For a time at the rate of \$1.20 net per thousand cubic feet; for the next year, \$1.15; then \$1.10; then \$1.05, and after January 1, 1907, \$1.00."

It also provides:

"Sec. 7. That within thirty days after the passage of this ordinance, the said grantee shall file with the city clerk, its acceptance of the provisions of this ordinance and of its terms and conditions and said ordinance with said acceptance, when said ordinance shall be approved by said electors at said election, and published as hereinafter provided, shall become and be a binding contract between said city and the grantee and its assigns, and all the franchises now exercised by the grantee shall be merged in the one hereby granted."

In due time, the defendant company accepted the ordinance and all the provisions and conditions therein contained. For nearly 16 years, the defendant operated under said ordinance, charging the rates therein fixed. On March 22, 1919, the city council, at the request of the defendant, passed ordinance No. J-1051, as follows:

"Section 1. That any person, firm or corporation, furnishing, selling and distributing gas to the city of Sioux City, and the inhabitants thereof, shall be entitled to charge and collect not to exceed one dollar and twenty cents per thousand cubic feet therefor, but shall be and are hereby required to deduct ten cents per thousand cubic feet from all bills paid on or before the discount day established by said person, firm or corporation furnishing said gas for the district in which said gas is consumed, and said person, firm or corporation is hereby authorized to establish said districts and discount days therefor, provided, however, that the minimum amount to be paid by any person whose premises are so connected with the gas mains of the person, firm or corporation furnishing said gas as to be served thereby, shall be fifty cents per month per meter.

"Section 2. That all ordinances and resolution and parts

thereof of the city of Sioux City, heretofore passed and adopted, fixing and establishing the rates to be charged for gas furnished to said city and the inhabitants thereof, be and the same are hereby repealed.

"Section 3. This ordinance shall take effect from and after its publication as required by law."

It was duly published, but was not submitted to the voters. No complaint is made that the rates so fixed are unreasonable, considering present war prices.

The demurrer was on the following grounds:

"First. The facts stated in said petition do not entitle plaintiff to the relief demanded.

"Second. Because it appears that the city council of the city of Sioux City, Iowa, on or about March 22, 1919, passed and adopted an ordinance authorizing and empowering this defendant to charge not to exceed \$1.20 per thousand cubic feet for gas furnished by it to consumers thereof in the city of Sioux City, Iowa, and repealing all ordinances and resolutions and parts thereof, theretofore passed and adopted, fixing said rates, which said ordinance was thereafter, as shown by plaintiff's petition, duly published, and the same is now in full force and effect, and said petition does not allege nor claim that the defendant herein is seeking to charge any higher rate than that fixed in said ordinance, passed March 22, 1919.

"Third. Because it appears by said petition that Section 4 of Ordinance No. F-7011 was repealed by Ordinance J-1051, and the same is of no force and effect, and the only ordinance in force in the city of Sioux City, Iowa, fixing and establishing rates to be charged for gas furnished the inhabitants of the city of Sioux City is said Ordinance No. J-1051.

"Fourth. Because, by Section 725 of the 1913 Supplement to the Code of the state of Iowa, it is provided that cities, acting by and through their respective councils, shall

have power to regulate and fix the rate for gas furnished to the inhabitants of the respective cities, and that this power shall not be abridged by ordinance, resolution, or contract; and it appears that the city of Sioux City, Iowa, has, by Ordinance No. J-1051, fixed the rates that may be charged by this defendant for gas, being the rates which this defendant, under and by virtue of said ordinance, is now charging.

"Fifth. Because, under the laws of the state of Iowa, and particularly Section 725 of the 1913 Supplement to the Code of Iowa, the power to fix and regulate rates to be charged by this defendant is lodged in city councils, and it is not required that an ordinance fixing said rates shall be submitted to the voters of said city for approval by them, and it further appears that said city council of said city has exercised the powers conferred upon it in passing said ordinance No. J-1051.

"Sixth. Because, until the passage of said ordinance No. J-1051, there had not been a valid exercise of the power to fix rates to be charged for gas by the city council of the city of Sioux City, Iowa.

"Seventh. Because, under the laws of the state of Iowa, no ordinance, resolution, or contract can be passed, adopted, or entered into which will deprive the cities of said state from exercising through their city council, at any time, the powers conferred upon them by said Section 725, and no ordinance, resolution, or contract passed, adopted, or entered into at the time of the granting of the franchise referred to in plaintiff's petition, could deprive the city of Sioux City of the power, through its council, to regulate and fix rates thereafter."

Appellant cites and relies on *Columbus R. P. & L. Co. v. City of Columbus*, 253 Fed. 499; *Muscatine Lighting Co. v. City of Muscatine*, 256 Fed. 929; and a memorandum and decree in another case, not reported. The *Columbus* case

arose under the statutes and law of Ohio, and the decision follows the rule laid down in Ohio, which seems to be contrary to the general rule, and is contrary to our own decisions. There is this further fact in that case, that the company was attempting to raise rates without the consent of the city council.

In the *Muscatine* case, the light company endeavored to change the rate fixed in the ordinance, and charge a higher one, without the exercise by the city of its power to regulate and fix rates, and without the consent of the city. We think the instant case is ruled by *Iowa R. & L. Co. v. Jones Auto Co.*, 182 Iowa 982; *Town of Williams v. Iowa Falls Elec. Co.*, 185 Iowa 493. Appellee also cites *City of Knoxville v. Knoxville Water Co.*, 212 U. S. 1; *Freeport Water Co. v. Freeport City*, 180 U. S. 587; *Wyandotte County Gas Co. v. State of Kansas*, 231 U. S. 622; *State v. Public Serv. Com.*, 270 Mo. 547 (194 S. W. 287); *State v. Public Serv. Com.*, 259 Mo. 704 (168 S. W. 1157); *Sandpoint W. & L. Co. v. City of Sandpoint*, 31 Ida. 498 (173 Pac. 972); *Salt Lake City v. Utah L. & T. Co.*, (Utah) 173 Pac. 556; *State ex rel. City of Sedalia v. Public Serv. Com.*, 275 Mo. 201 (204 S. W. 497); *Denver & S. P. R. Co. v. City of Englewood*, 62 Colo. 229 (161 Pac. 151).

All questions presented in this case are passed upon and decided adversely to appellant's contention in the *Jones* case, *supra*. It is true that the charges in that case had to do with heat, rather than gas, but the same power is given cities to regulate and fix the rate for gas as for heat. They both appear in the same section. It is true that there is this difference between that case and this. In that case, the ordinance provided that the council might change the rate, but the court said that this adds nothing to the statute.

Code Section 720 has to do with the power to grant certain rights or franchises for a term of years, subject to a vote of the electors. There is no provision in that section

for regulating or fixing rates. Code Section 725 is the statute containing the continuing governmental power of rate-making, with limitations on the abridgment thereof by ordinance or contract.

Without further discussion, we reach the conclusion that the ruling of the trial court was right, and the judgment is, therefore,—*Affirmed*.

LADD, EVANS, and SALINGER, JJ., concur.

WEAVER, C. J., dissents.

EDWARD THOMPSON, Appellee, v. J. J. RYAN, Appellant.

BROKERS: Commission Payable in "Securities"—Failure to Con-
1 **summata Contract.** A broker who, for effecting a sale for his principal, agrees to accept as commission a certain amount of "securities" which the principal is to receive from the other party to the sale, is not entitled to a money judgment against his principal for his commission, when such principal is in no wise to blame for the nonconsummation of the sale contract. In other words, the broker in such circumstances does not earn his commission until a sale is *actually effected*—until the "securities" are delivered to the principal.

BROKERS: Fraud as Defense Against Commission. A broker may
2 be entitled to his commission from his principal, even though the contract of sale was never carried out by the parties; but not so when the principal has been led into the contract by his broker's fraud. Evidence held to demand the submission of such issue of fraud.

Appeal from Webster District Court.—H. E. FRY, Judge.

SEPTEMBER 26, 1919.

SUPPLEMENTAL OPINION ON REHEARING, FEBRUARY 16, 1920.

ACTION at law to recover a commission on the sale or exchange of real property. There was a trial to a jury, and

a verdict and judgment for plaintiff, and the defendant appeals. The plaintiff has also appealed from the action of the trial court in instructing the jury to allow interest, in case of recovery, from the commencement of the suit, instead of from the date plaintiff claims his service was completed. —*Reversed on both appeals.*

Mitchell & Files, for appellant.

H. W. Stowe and Hunn & Jones, for appellee.

PRESTON, J.—1. Defendant, having first appealed, is the appellant. Numerous errors are assigned by appellant for reversal, and points by appellee for affirmance. There is one thing about the record that strikes us as peculiar, and that is that appellee does not argue at all the question of fraud argued by appellant. The question of fraud or representation was tendered in the pleadings, but withdrawn or ignored by the court in the instructions. Nor does appellant argue at all the question of interest, which is presented by plaintiff on his appeal; so that we shall have to get at these questions the best we can, with argument on only one side.

Plaintiff is a real estate broker. Some time prior to October 11, 1912, defendant had purchased the 570 acres of land he now owns, and in dispute in this case, and in that transaction the plaintiff had been interested, as broker in that sale, and claimed to be entitled to a commission from the party who then sold the land to defendant; and plaintiff had brought some kind of an action to establish a lien on the land. That suit was pending when the contract soon to be referred to was entered into between plaintiff and defendant. Prior to the execution of this contract, there seems to have been an understanding between plaintiff and defendant, by which plaintiff had undertaken to make a sale for defendant, of defendant's land in dispute, to Mrs.

1. BROKERS: commission payable in "securities;" failure to consummate contract.

Saucerman, and under which plaintiff claims to have performed, and put in his time in bringing about the trade.

On October 11, 1912, plaintiff and defendant entered into the following contract:

"Des Moines, Iowa, October 11, 1912. It is hereby agreed and has heretofore been agreed and understood that if the deal or trade is made by J. J. Ryan of Fort Dodge, Iowa, and Mrs. F. Saucerman of Des Moines, Iowa, I hereby agree to pay to Edward Thompson of Callendar, Iowa, the sum of \$3,000 for acting as my agent in the matter and the said Edward Thompson is to accept securities for same that I receive of Mrs. F. Saucerman. It is agreed Edward Thompson will dismiss suit affecting title of the land trade. Signed in duplicate, J. J. Ryan, Edward Thompson."

After this agreement, the plaintiff dismissed the suit that was then pending. A month or more after this contract, the defendant and Mrs. Saucerman, an old lady, about 75 years of age, who died some time in 1913, entered into a written contract as follows:

"Exhibit No. 1. This agreement made this 9th day of November, 1912, between J. J. Ryan of the county of Webster, state of Iowa, party of the first part and Mariam Saucerman of the county of Polk and state of Iowa party of the second part as follows:

"The party of the first part hereby sells to the party of the second part on the performance of the agreements of the party of the second part as hereinafter mentioned, all his right, title and interest in and to the real estate situated in the county of Palo Alto and state of Iowa, to wit: [describing defendant's 569.81 acres in Palo Alto County.]

"And the party of the second part in consideration of the premises hereby agrees to and with the party of the first part, to purchase all his right, title and interest in and to the real estate above described, situated in the county of Palo Alto and state of Iowa, and to pay and exchange there-

for and sell and convey to the party of the first part the following described premises situated in the county of Polk and state of Iowa, a more particular description of which is hereafter set out marked Exhibit A and made a part of this contract.

"In addition to the conveyance of the land described in Exhibit A the party of the second part agrees to pay to the party of the first part the sum of seven thousand five hundred (\$7,500) dollars in good securities, consisting of mortgages and real estate contracts in force where equities are amply good. Each party to assume and pay the incumbrance upon the land received by him or her, but any difference in the amount of incumbrance is to be made up by either an increase or decrease of negotiable securities above described."

Exhibit A, attached to that contract; contains a list of a large number of lots and parcels of land, 30 or 40 or more. This contract is dated November 9, 1912, but was not signed at that time, but was signed at a later date. This contract was drawn by Mr. Sullivan, and plaintiff, defendant, Mrs. Saucerman, and her daughter, or granddaughter, and her attorney, Steele, were present. It is conceded that this contract between defendant and Mrs. Saucerman was never performed. The defendant had made at least some examination of Mrs. Saucerman's property, and, as we gather, this was before the last-named contract was signed; and Mrs. Saucerman had employed an attorney to assist her, but perhaps more with reference to the condition of her own affairs. The \$7,500 securities that Mrs. Saucerman was to turn over to defendant might, according to the contract, be increased or decreased, according to the amount of incumbrance on her properties. It appears that, upon investigating the incumbrances, it was found that she would have to turn over to appellant about \$12,000 in securities, to make up the difference, and that, to release these securities, she

would have to put up to the Loan and Trust Company more than \$10,000; so that, as contended by appellant, and as testified to by Mrs. Saucerman's attorney, Mr. Steele, figuring it that way, it would take about \$20,000 for her to make the deal. The securities were not released nor turned over, nor offered to be turned over to appellant. Exhibit 1 provides that abstract shall be furnished. After the contract, appellant had abstracts perfected to his land, and tendered the same to Mrs. Saucerman; but he never received an abstract to any of the Saucerman property, though he demanded the same from her and plaintiff,—at least, the evidence tends to so show. In January, 1913, Mrs. Saucerman sold a part of the property covered by Exhibit 1, and, in February, sold several other parcels; and, as appellant contends, she put it out of her power to carry out or perform her contract. The trial court submitted the case to the jury on the theory that the jury should determine whether the defendant or Mrs. Saucerman was to blame for the nonperformance of the contract, Exhibit 1, and some of the terms and conditions thereof. Plaintiff alleged, among other things, that Mrs. Saucerman was ready, able, and willing to perform her part of it; but, as we understand appellee now, his contention is that some of these allegations were surplusage, and he was not required to prove them,—at least, that he was only required to make out a prima-facie case. The trial court instructed on these several matters, and the instructions, or some of them, are complained of. Appellant contends, also, that some of the instructions given by the court had no support in the evidence, and that they were, therefore, erroneously given, and that there were some material issues in the case, and evidence to support them, which were not submitted to the jury, and that this was error. In our view of the case, some of these matters are not controlling. The real controversy in the case, we take it, in so far as it refers to the issues that were submitted to

the jury, is in regard to the question as to what the plaintiff, under the contract between himself and defendant, was required to do, and when his commission was earned. Appellant contends that the trial court adopted the wrong theory in regard to this, and his claim is, substantially, stated as briefly as we may, that, before a broker is entitled to commission for sale or exchange of property, a binding contract must be made, and the purchaser must be ready, able, and willing to carry out the terms thereof (citing *Greusel v. Dean*, 98 Iowa 405; *Nagl v. Small*, 159 Iowa 387, 390; *Ketcham v. Axelsson*, 160 Iowa 456, 458, 471; *Beamer v. Stuber*, 164 Iowa 309, 311, 312; *Flynn v. Jordal*, 124 Iowa 457; *Snyder v. Fidler*, 125 Iowa 378; *Jones v. Ford*, 154 Iowa 549, 554); and that, where there is something to be done by the purchaser or by the other party to the contract, such as the execution of notes, turning over of securities, or furnishing of an abstract, the contract is not completed and enforceable until such act is performed, and such condition complied with (citing the *Ketcham* and *Snyder* cases, *supra*, and *Marple v. Ives*, 111 Iowa 602, 604). Appellee concedes that this is the rule in certain cases, but contends that it does not apply to the kind of a contract which was entered into between plaintiff and defendant. In the *Greusel* case, the commission was due whenever plaintiff should succeed in disposing of the property in the manner and on the terms acceptable to the defendant, and it appeared that plaintiff brought a party to defendant who agreed to and did purchase said goods, on terms acceptable to the defendant. The plaintiff in that case, the broker, was to dispose of the property in the manner or on terms acceptable to defendant. The contract was not performed, nor the property disposed of; and, under such a contract, it was held that plaintiff was required to find a purchaser who was able and willing to make the purchase and complete the contract. The *Nagl* case is relied on by appellee, and will be referred to later. The

Ketcham, *Flynn*, and *Snyder* cases are also relied upon by appellee, and will be referred to later. In the *Beamer* case, the question was whether plaintiff was to find a purchaser; and the holding was that this duty is performed when the agent finds and introduces to his principal a person who is ready, able, and willing to buy on the terms proposed by or acceptable to said principal,—a different contract, we think, from that presented in the instant case. In the *Jones* case, the broker was to procure a purchaser ready, able, and willing to buy on terms satisfactory to the seller; and it was held that the evidence was sufficient to sustain the finding that the broker did secure a purchaser who was ready, able, and willing to comply with the conditions.

On the other hand, appellee contends that where, as here, the plaintiff was required to do the things specified in his contract, and the property owners have entered into a binding contract, then his commission is due: in other words, that, under his contract, the deal or trade is made when there is a binding contract between the two property owners. He cites and relies on *Wenks v. Hazard*, 149 Iowa 16; *Nagl v. Small*, supra; *Flynn v. Jordal*, supra; *Ketcham v. Azelson*, supra. Appellee also relies on the case of *Lamb-scher v. Miell*, 171 Iowa 88, as holding that, to be entitled to a commission where no completed transfer is made, a broker employed must find a purchaser, or one who will trade upon terms fixed by the principal, or take from the customer a binding contract of purchase or trade, acceptable to the principal. In the *Wenks* case, the court, after stating that there was more or less confusion in the cases, said:

"This is not a case where the commission was to become due upon a completed sale. Nor is it a case where the terms and conditions of the sale were fixed in advance by the owner, and he agreed to pay a commission when a purchaser on the terms stated was produced. Where the

commission depends upon a consummated sale, the burden rests upon the plaintiff to show that the purchaser was able and willing to perform, and that the owner was at fault. And the same rule applies where the terms are fixed in advance by the owner, and the agent claims to have procured a purchaser upon the terms stated. The case at bar belongs to still another class, in our judgment. Here, the terms of sale were not fixed in advance by the owner, and therefore it was impossible for the plaintiff to know what they were or might be. The terms and conditions of the sale being expressly reserved for determination by the owner, it is manifest that the agent or broker cannot know whether the purchaser can or will accede to the terms fixed. The owner reserves the right to and determines the ability of the purchaser to pay, or to comply with other terms which he may fix; and it would be manifestly unjust to say to the broker that his commission must depend upon the correctness of the owner's judgment or ability."

After reviewing a number of decisions, the court said further:

"In none of the cases, so far as we have been able to find, has it been held that there can be no recovery where the owner reserves the right to fix his own terms and conditions, and agrees to pay a commission for a purchaser who will enter into such a contract as he shall dictate."

It may be conceded that the contract in the instant case is not in the precise language of the cases cited by appellee. We shall not stop to review them, but say that we think the contract in question comes more nearly within the rule laid down in such cases.

2. Conceding this to be the proper rule, as applied to the contract in this case, it is important to determine whether the contract between Mrs. Saucerman and the appellant

2. **BROKERS: fraud
as defense
against com-
mission.**

was made in good faith, or whether it was obtained by fraud and misrepresentation by the plaintiff. Such is appellant's contention. He assigns as error that the court erred in the first instruction, in that said instruction withdraws from the jury material and proper matter pleaded by defendant in his answer, to wit, the fraud of plaintiff in procuring defendant's signature to the contract, Exhibit 1, and the failure to furnish abstracts, as agreed in said contract; and that said instruction does not clearly state the issues. The question of the alleged fraud was not submitted to the jury, but was expressly withdrawn, on the ground that the evidence in relation thereto was insufficient to submit to the jury; and, as we have said, it is not argued by appellee. We are, therefore, not advised what appellee's theory is, nor that of the trial court, at this point; but we reach the conclusion that there is merit in this assignment, and that appellant's contention must be sustained. It should be kept in mind that there was some little time after the preparation of Exhibit 1, before it was signed. The defendant testified that Mrs. Saucerman came to see him at Fort Dodge, between the time the contract was written and the time it was signed; but this was stricken, on plaintiff's motion, and defendant was then asked to state the conversation, and objection to this was sustained. Thereupon, appellant offered to prove:

"The defendant proposes to prove by this witness that, subsequent to the writing of the contract, and before it was signed, Mrs. Saucerman called at his home, and stated to him that it was not possible for her to raise the money to release the securities which, according to the terms of the contract, as written, she was to turn over to the defendant, unless she could raise about \$12,000 or more for that purpose; that, unless she could make that loan, or it could be made for her, she was unable to perform the contract."

This offer was denied. In view of what follows, we think the witness should have been permitted to testify to the matter contained in the offer. The defendant, in his answer, pleaded the following:

"Defendant further states and shows to the court that Mrs. Saucerman was a stranger to this defendant, and that he knew nothing about her financial responsibility or her ability to carry out and perform the terms of said contract; that plaintiff claimed and pretended to be well acquainted with said Mrs. Saucerman, and to have knowledge of the property owned by her, and of her ability to perform and carry out said contract; that, at the time defendant signed said contract, he did so upon the representation orally made to him by plaintiff that Mrs. Saucerman would be able to raise money to release the securities referred to in said contract, and which securities had, previous to that time, been pledged by Mrs. Saucerman. Plaintiff also, at said time, represented to defendant that said securities, when so released, would be turned over to defendant, and that Mrs. Saucerman was in a position to carry out and perform the terms of said contract, Exhibit 1. That, relying on the representations of plaintiff, and believing that the same were true, which belief was founded on the statements and representations made by plaintiff, defendant signed said contract. Defendant now states that said representations were false; that plaintiff knew, or should have known, that the same were false, at the time he made them to defendant; and that said representations were made for the purpose of deceiving this defendant, and of inducing him to sign said contract."

The defendant, as a witness, testified that plaintiff called upon him, after Mrs. Saucerman came to see him, and before Exhibit 1 was signed, and that he had a talk at that time with plaintiff about Mrs. Saucerman's ability to carry out the contract. He says:

"I told him that Mrs. Saucerman and her granddaughter were at my home, a short time before, and wanted me to make a loan of \$12,000 with which to release their securities, and that I refused to do it. He said that he had made arrangements with the Bankers Life Insurance Company to make that loan, by increasing the mortgage on the Palo Alto County land. He was to get part of it by loan with the Bankers Life, and that he could get the balance from friends in Chicago. He asked me if I would be willing to sign an application on the Palo Alto County land, in order to enable Mrs. Saucerman to get the money to release the securities. I told him I would; but I also told him, at the time he was insisting that I sign the contract, of my doubts of Mrs. Saucerman being able to meet it, and that I didn't want to get into any law suit. He said: 'There will be no law suit about it.' When I signed the contract, I signed it relying upon Mr. Thompson's statement that he had arranged with the Bankers Life Insurance Company to make the loan for a part of the money, and that he would get the balance from his relatives. I relied upon that statement absolutely. I knew not a thing concerning the financial responsibility of Mrs. Saucerman."

The defendant did sign an application for a loan with the Bankers Life, but it was refused. The plaintiff had not arranged for the loan. He did prepare an application therefor. As said, this was before Exhibit 1 was signed; and the defendant set out in his answer, and testified, that he signed the Saucerman contract, relying on such representation. The defendant's evidence, before set out, went in without objection, and there was no objection by plaintiff to the sufficiency of the defendant's answer in regard to the alleged fraud, and no question of that kind is made in this court. It must be conceded that the pleading is not as definite as the defendant's evidence. It may be that the trial court's theory as to this was that the alleged representa-

tions that Mrs. Saucerman would be able to raise money to release the securities, and that, when said securities were released, they would be turned over to the defendant, were matters of opinion, and this may be so; but there is the further statement that it was represented that Mrs. Saucerman was in a position to carry out and perform the terms of said contract. Doubtless, the theory of the pleader was that she would be able to do this if plaintiff arranged for the loan she was trying to get, in order that she might pay the \$12,000. His statement that he had arranged for the loan clearly would be the statement of a fact. Under the entire record, we think such should be the construction of the pleadings. If, then, the defendant's signature was thereafter obtained by such false representation, made by the plaintiff, there would be no binding contract between Mrs. Saucerman and defendant; and, in that case, the plaintiff would not have performed his contract with the defendant. We think the trial court erred in withdrawing this issue from the jury.

Other questions are argued, in regard to supposed error in some of the instructions and in rulings on evidence; but they are such as that they are not likely to occur on a retrial of the case, since it will doubtless be tried on a somewhat different theory.

3. Since we hold that, under the contract, plaintiff was entitled to his commission when a valid contract was signed between the property owners, we think he would be entitled to interest from the date of the actual signing or execution of the contract, if it should be found that there was such a binding, enforceable contract made. And we think the court erred in allowing interest only from the commencement of the suit. Because of the reversal of the case on appellant's appeal, it may be that we are not required to pass upon this question, but have concluded to say this much, in view of a new trial. The cost of appellee's additional abstract

and argument on this question of interest will be taxed to appellant. For the reasons given, the cause is—*Reversed and remanded.*

LADD, C. J., EVANS and SALINGER, JJ., concur.

SUPPLEMENTAL OPINION ON REHEARING.

The reversing opinion in this case, on defendant's appeal, was made to turn on the error of the trial court in failing to submit to the jury the question of fraud. The cases

3. BROKERS: commission payable in "securities;" failure to consummate contract. were reviewed, to some extent, as to the character of the contract, and the statement was made in the opinion, just before Paragraph 2:

"We shall not stop to review them, but say that we think the contract in question comes more nearly within the rule laid down in such cases."

A majority of the court are now of opinion that such statement is not correct. The statement just quoted is, therefore, withdrawn. The writer of the opinion still thinks that the statement is correct, unless a different rule applies because of the provision in the contract between plaintiff and defendant which reads: "And the said Edward Thompson is to accept securities for same that I receive of Mrs. F. Saucerman." That question was not discussed in the original opinion. Though the contract between Ryan and Saucerman, on the face of it, was executed, it is conceded that it was not consummated by them by an exchange of properties, and that no securities were received by Ryan from Mrs. Saucerman. If it should be found, as claimed by defendant, that the contract was obtained by fraud, there would, of course, be no contract at all. If it should be found that the contract was not obtained by fraud. then the question is whether plaintiff would, in any event, be entitled to a money judgment, or whether he would only be entitled to

a commission, if at all, out of the securities which Ryan receives of Mrs. Saucerman. Had the securities been turned over to Ryan, and he had refused to allow plaintiff his commission out of the securities, we would have a different proposition. But, under the contract and evidence in this case, we are of opinion, and hold, that, even though the contract was executed without fraud, a proper construction of it is that plaintiff is not entitled to a money judgment, but is only entitled to his commission, if at all, out of a specific fund: that is, out of the securities that Ryan should receive from Mrs. Saucerman. Plaintiff framed his cause of action on the theory that the appellant, Ryan, was wholly at fault, and that the customer, Mrs. Saucerman, was not at fault, but was ready, able, and willing to complete her contract. But the evidence shows that appellant, Ryan, was not at fault, and was ready, able, and willing to perform his part of the contract with Mrs. Saucerman, and that she could not perform her part. She had placed it beyond her power to convey the property. Plaintiff was well acquainted with Mrs. Saucerman and her property and her affairs, and was a lodger in her home. It was competent for plaintiff to provide in his contract that the commission should be payable out of a specific fund, or securities, to be received by Ryan from Mrs. Saucerman; and, in that case, he would not be entitled to a commission except out of the securities, unless it should appear that the principal, Ryan, was at fault. We think the contemplation of the parties was that plaintiff should receive his commission out of the securities.

Ormsby v. Graham, 123 Iowa 202, 213, 215, was an action for specific performance, in which the agent was made defendant, and he, by cross-petition, asked judgment for his commission. The contract provided, in substance, that the agent was to use all proper efforts to sell, upon the stated terms and conditions, to draw all papers necessary to consummate the sale, and to pay over the cash payment re-

ceived, less commission and expenses. The owners, on their part, were to execute and deliver a deed when the land was sold, and to allow the agent the stipulated "commission, to be retained in full out of the cash payment," or, "if the payment does not pass through the agent's hands, then appellants are to pay the commission directly." The contract in that case is not precisely like the one in the instant case, in that, in this case, there is no provision in the contract that the owner is to pay the commission directly, if the cash payment does not pass through the agent's hands. The other provision in each is somewhat similar. There, he was to retain his commission out of the cash payment. In the instant case, the contract provides that Thompson is to accept securities for his commission that are received from Mrs. Saucerman. In the *Ormsby* case, the different rules are stated, as applied to different contracts; and it was held that the agent's action was based upon a special contract of agency to sell. That a completed sale, as a basis for the recovery of commissions, was contemplated by the parties, was shown in the stipulation, which authorizes the agent to retain his compensation from the first cash installment, from the price for which the property might be sold. The opinion refers to a similar case in *Cremer v. Miller*, 56 Minn. 52, where the commission was to be the excess obtained over a fixed net price. It was there held that a sale should be consummated, before an action by the agent could be sustained. In the *Ormsby* case, other reasons were given for not allowing the commission, but they do not bear so strongly on the question now before us as the one we have given.

Robertson v. Vasey, 125 Iowa 526, is somewhat similar to this. In that case, the contract was construed to mean that payment of the agent's commission was dependent upon the payment of the purchase price of the land, and that the commission and land contracts should be construed together, so far as they relate to the purchase price. As bear-

ing upon this question, appellant cites, also, *Columbia Realty Inv. Co. v. Alameda Land Co.*, 87 Ore. 277 (168 Pac. 64); *Owen v. Ramsey*, 23 Ind. App. 285 (55 N. E. 247); *Manton v. Cabot*, 4 Hun (N. Y.) 73; *McPhail v. Buell*, 87 Cal. 115 (25 Pac. 266); *Campbell v. Cove Ranch L. & L. Co.*, 28 Ida. 445 (155 Pac. 662); *Wilson v. Rafter*, 188 Mo. App. 356 (174 S. W. 137); *Lindley v. Fay*, 119 Cal. 239 (51 Pac. 333); *Roach v. McDonald*, 187 Ala. 64 (65 So. 823).

We shall not take the space or time to refer further to such cases. What has been said herein qualifies in like manner the last paragraph of the opinion in regard to interest. Interest would not be allowed, in any event, unless the securities were received. As modified by this supplement, the original opinion will stand, and the petition for rehearing is overruled.

WEAVER, C. J., LADD, EVANS, and SALINGER, JJ., concur.

ROBERT E. YOUNG et al., Appellees, v. H. L. DUCIL et al.,
Appellants.

EASEMENTS: Naked Use. *Naked use* of land as a road, with consent of the owner, howsoever long continued, will not ripen into an easement.

DEDICATION: Use of Land for Road—Presumption. No presumption or inference of dedication arises from the *naked use* of land for a roadway, howsoever long continued. One may not be held to have dedicated his land to public or private use, short of evidence which establishes a positive and unmistakable intention to permanently abandon his property to public or private use.

Appeal from Pottawattamie District Court.—E. B. WOODRUFF, Judge.

FEBRUARY 16, 1920.

ACTION to enjoin the obstruction of what is claimed to be a public and private road. Opinion states the facts. Judgment for the plaintiffs in the court below. Defendants appeal.—*Reversed*.

Saunders & Stuart, for appellants.

Kimball & Peterson, for appellees.

GAYNOR, J.—This action is brought to restrain the defendants from interfering in any manner with plaintiffs in the exercise of a claimed right to cross defendants' land at a certain point. It is asserted that there

1. EASEMENTS:
naked use.

is a roadway at the point where plaintiffs claim the right to cross; that this roadway has existed and has been used by plaintiffs and the general public for a great many years; and that plaintiffs have acquired an easement in defendants' land, and a right to cross it within the limits of this road. Plaintiffs say that they and their grantors have continuously, openly, notoriously, and adversely used this roadway, as a means of access to their premises, for more than 20 years, and that the road has been so used by them and the public generally; that this defendant, Ducil, but recently acquired the ownership of the property on which the road lies; that his predecessors and immediate grantors have acquiesced in the claims of the plaintiffs, and have acquiesced in the easement in favor of plaintiffs, for more than 20 years; that the defendants are now estopped from denying plaintiffs' right to cross the premises over this road, and are estopped to deny plaintiffs' claim to an easement therein; that the defendant Sollazo is the tenant of the defendant Ducil, in possession; that this is the only way of ingress or egress to plaintiffs' property; that, unless restrained, the defendants will destroy the rights of the plaintiffs in the easement herein asserted.

The defendants deny plaintiffs' claim; deny that plaintiffs have acquired any easement in any road over the land, and especially deny that plaintiffs have any easement at the place where they now claim a right to pass over the land; say that plaintiffs are not denied ingress and egress to their land; that, on the east of plaintiffs' land, there is a creek; that, on the east of the creek, is Broadway, a well-traveled and paved street; that, by the construction of a bridge over this creek, complete access to plaintiffs' land can be had from Broadway. Defendants filed a cross-petition, saying that the claim of plaintiffs is a cloud on their title, and asking that their title be quieted against plaintiffs' claim.

Upon the issues thus tendered, the cause was tried to the court, and a decree entered for the plaintiffs, as prayed. From this, defendants appeal.

In order to properly understand these conflicting claims and the evidence relied upon to support them, it is necessary that we have a knowledge of the location and situation of the respective properties and the public streets of the city.

Broadway is one of the principal streets, runs north and south, and is on the east side of the property in question. Indian Creek is on the west side of Broadway, and is between the lands owned by these parties and Broadway. It is a deep creek, and Broadway cannot be reached from plaintiffs' property without bridging it. On the south of defendants' property is a street known as Fleming Street. This runs east and west, crosses Indian Creek, and abuts on Broadway. Defendants' property, over which this road is claimed, abuts on and is immediately north of Fleming Street. Plaintiffs' property adjoins defendants' property on the north, and is bounded also on the east by Indian Creek and Broadway. All the land now owned by plaintiffs and defendants was formerly owned by one N. W.

Williams. N. W. Williams sold the land now claimed by the plaintiffs, to one Lou Hammer. Hammer sold it to the plaintiffs in 1899. N. W. Williams, in 1896, sold to Mark Williams the property now owned by the defendants. In 1906, Mark Williams sold to one Norgaard, and Norgaard, in 1917, sold to the Vierland Company, and, in the same year, the defendants purchased it from that company. During the time Mark Williams and Norgaard owned the property, there was a brick kiln on the property, running north and south, paralleling Indian Creek. A little farther north, and to the west of the kilns, was a gristmill. These kilns and this mill were operated during that time by either Williams or Norgaard. The road in question was used through all this time as a way of access to the mills and brickyards, and ran in a northerly direction from Fleming Street to the mills and brickyards. It was used by the owners of these mills and brickyard in connection with their business. It ran along the west side of the brick kilns, and the east side of the gristmill. It was used by persons who came upon defendants' land to transact business at the brickyard and the mill, to haul grain to the mill for grinding, and to haul feed after it was ground, and to haul wood used in burning the brick, and to haul away the brick when burned. It seems to have left Fleming Street at a definite point, but spread out over the yards, and was used as the convenience or exigencies of the business at the mill and yards required. In other words, it was a sort of doorway, opened to the public by the then owners, as a way of access to the property and the business carried on thereon. This road, if we call it such, extended to the north line of the land so used. There also seems to have been a dumping place north, and along the side of the river, to which refuse was carried over this road and dumped—by whom, it does not appear. Plaintiffs' house was about 200 feet west of the north terminus of this

claimed road. Plaintiffs, in coming into the city, passed 200 feet east on their own land, reached the point of travel on what is claimed to be the road now in dispute, and turned south, and passed along by the mills and brick-yards to Fleming Street, thence east on Fleming Street over the bridge onto Broadway.

It does not appear that the public used any portion of this road beyond the north limits of the property so occupied by the defendants, and then only for the purpose of transacting business with the defendants' grantors at this mill and at these yards. There is some testimony that one Albury, who worked for Mark Fleming in the mill or in the yards, passed over this road in reaching his place of work. The use to which this road, if it be a road, was put, is well exemplified in the testimony of one Weaver, who lived in the plaintiffs' house in 1897, just before the plaintiffs bought it. He said:

"During the summer I lived there, people were coming to the brickyard, hauling wood and piling it there to burn brick, and coming in there and hauling away brick from the brickyard, and bringing grain and material to the mill, and hauling away feed, driving stock to and from the stockyards, and buying and selling cattle at the stockyards. The road was about halfway between the brick kiln and the mill, one on one side of the road and one on the other, and was about 30 feet east of the mill, measured from about the center of the brick kiln, and the track was used in going to the mill and kilns, and to deliver goods to Young's house."

Another witness testified that he had seen this place (meaning the road and territory surrounding it) frequently since 1893; that there was no bridge between Fleming Avenue and Elliott Street. (Elliott Street is north of Fleming Avenue.)

"People coming to this place traveled over the same road to the brickyard. The road was practically where it

is now. I saw a good many teams go out and in there. I saw people go to the kiln and mill, and saw people dumping garbage on the east side of the road. The road extended clear to the line of the place. The object of dumping garbage was to fill up the ground. The ground was naturally low, and that was what the garbage was put in there for, to fill the low land as high as the bench. On the lower side, it was filled up with garbage, and the ground had been raised by filling in with brickbats and stuff of that kind. There was a stockyards in there at one time, operated by Hammer & Able. They were buying and selling stock, and Able used to buy stock and put it in these yards and keep them there until he could take them out for sale. Stock was driven back and forward over these lots."

It will be noted that the claimed road was not originally designed for public travel. It was not originally used for public travel. Its purpose was to afford access to the business conducted by the owners on their own property. To that purpose, it was devoted by the owners of the property, and for that purpose it was used by the public. Plaintiff, whose property lies north of the north terminus of the road in question, had a roadway from his home east about 200 feet towards Indian Creek, to a point marking the north terminus of the road over defendants' property. There is no doubt that he traveled east on his road, and then south over this tract, known as the mill property, for more than 10 years. He claims an easement by prescription,—a right to compel the owners of the land, upon which this mill road was, to keep it open for his private use. What are his rights under the record made?

Section 3004 of the Code of 1897 provides:

"In all actions *hereafter* brought, in which title to any easement in real estate shall be claimed by virtue of adverse possession thereof for the period of ten years, the use of the same shall not be admitted as *evidence* that the

party claimed the easement as his right, but the fact of adverse possession shall be established by evidence distinct from and independent of its use, and that the party against whom the claim is made had express notice thereof; and these provisions shall apply to public as well as private claims."

Mere proof of use, therefore, is not sufficient. The use may be permissive only. To invest the plaintiff with a right to a continued use, he must show something more than use for the statutory period, and two things more are essential: (1) That he claimed an easement as his right, and this must be established by evidence distinct from and independent of its use; and (2) that the party against whom the claim is made had express notice thereof,—that is, not of the use, but of the claim of right to use against the objections or protest of the owner. A right that starts permissively, and is not claimed as a right independent of permission, does not start the running of the statute. Plaintiff has recognized this fact in the preparation of his case, and has sought to show, by evidence independent of the use, a claim of right to the use, and knowledge of the owners of the land of this claimed right.

It will be noted that the statute above quoted was adopted in 1873. It was not in any of the statutes preceding that, and added a new rule—a more stringent rule than was required prior to that time. So, therefore, decisions made prior to the adoption of this statute do not control in controversies of this kind, and are not entitled to be considered. The legislature made the paramount law. It is this that governs in all actions arising since the adoption of the statute. To meet the requirements of the statute, the record must show something, independent of user, that indicates that the plaintiff was claiming a right to the use of the street adverse to the owner of the land; that he was claiming a right to use it, and not that he was simply tak-

ing advantage of the fact that no objections were urged to his use. He testified:

"I lived continuously in the place from the time I bought it until two years ago. I used this road as a means of ingress and egress to my lots, and traveled it nearly every day, more or less. Delivery wagons came up that road to my place, and I went down the road to get my mail. I went to Mark Williams, when he owned the place, and got 15 or 20 loads of brickbats from him and put them at the foot of the hill on my place, and then I put dirt over that from the dirt on the bank. The brickbats were on the ground where Williams was going to put a kiln that spring, and he was glad to have them hauled off, as it saved him hauling. His men helped shovel the brickbats into my wagon. The brickbats I put on the road that runs down on my place to where I turned to go on the Williams' property. He told me I could have all I wanted, for he would have to haul them away."

So it is apparent that the improvement, by the use of the brickbats, was not placed upon any part of the road now in controversy. There is no evidence that he ever verbally asserted to Mark Williams any claim of right to use this road, and never, until just before the suit was brought, did he make any such assertion to Norgaard, successor to Mark Williams. He says:

"I don't think Mr. Norgaard and I raised the question, until this Italian fenced this lot up. That was about three years before the trial was had."

It is next contended that, some time after Norgaard got the property, plaintiffs and Norgaard proposed to plat the entire property, Norgaard's and plaintiffs'; that they prepared plats; that the plats were submitted to the city council; that the plats, as prepared, provided for a street along the line now claimed by plaintiffs; that the

2. DEDICATION:
use of land for
road: pre-
sumption.

city refused to approve the plats; that the scheme was abandoned. It appears that, thereafter, Norgaard platted some lots along the south side of his property, abutting on Fleming Street, and that these lots were 50 feet wide, and numbered 1, 2, 3, etc., towards the west; that lot No. 1 on the plat covered the very point where it is claimed this street entered defendants' property from Fleming Avenue; that Lot 2 was sold to a man by the name of Fredrickson; that Fredrickson improved his lot, and, we think the record shows, built upon it. It does not show that Lot 1, to the east of Fredrickson's, covering the place where the road left Fleming Avenue, was ever sold or improved. There is also some claim that a culvert was put in at a point where this road leaves Fleming Avenue. There is no significance in this, however, for the reason that, at that time, the road was used in connection with the mill and yards, and it affords no basis for saying either that the owners of the land knew of plaintiffs' claim, or that they acquiesced in it. There is absolutely no evidence in this record of any intent on the part of the owners to dedicate this road to public use. As bearing upon this question, see *Gates v. Colfax N. R. Co.*, 177 Iowa 690; *Jones v. Peterson*, 178 Iowa 1389; *McBride v. Bair*, 134 Iowa 661; *O'Malley v. Dillenbeck Lbr. Co.*, 141 Iowa 186.

As said in *Jones v. Peterson*, 178 Iowa 1389, 1394:

"Nor is there any presumption or inference of a dedication from mere use alone, but there must be some act or word or course of conduct on part of the alleged dedicator, fairly indicating his actual intent to give or grant the easement to public use. As said in a very recent case: 'The owner's acts and declarations should be deliberate, unequivocal, and decisive, manifesting a positive and unmistakable intention to permanently abandon his property to the specific public use.' * * * An owner of property should not be held to intend an abandonment or surrender of it to

public use on doubtful or unsubstantial grounds, or because of conduct which is entirely consistent with the absence of such intention. There is nothing whatever in the evidence showing that plaintiff or any of his grantors ever contemplated or manifested any purpose to dedicate this road to the public."

The same doctrine was repeated in *O'Malley v. Lumber Co.*, supra. In *McBride v. Bair*, supra, it is said:

"Undoubtedly, defendant and those under whom he claims knew of the use, but user and knowledge thereof is not enough. There must have been a claim of right, independent of user, of which defendant or those under whom he holds had express notice."

Applying the rule of these cases to the situation here, we have to say that the conduct of the defendants touching this right was entirely consistent with the absence of any intent to dedicate it to public use. The road was there, and used for their own purposes. It was used in connection with the business carried on by them upon the lots to which the road made access. There is certainly no evidence which manifests "a positive and unmistakable intention to permanently abandon this property to public use," or to the private use of these plaintiffs. The best that the record shows is that the owners of this property did not object to plaintiffs' using the road, so long as there was no bridge across Indian Creek at the point where plaintiffs' property was situated. The best that can be said for plaintiffs' use is that it was permissive, and this is not sufficient, under the statute, to sustain a claim of right to a permanent easement in the property—a right to be exercised against the will of the owners of the estate.

Upon the whole record, we think the court erred in finding for the plaintiff. Judgment and decree should have been entered for defendants. Its judgment is, therefore,—*Reversed.*

WEAVER, C. J., LADD and STEVENS, JJ., concur.

ME. A. ASHTON, Appellee, v. J. E. CRANDALL, Appellant.

BOUNDARIES: Survey—Intention. Evidence reviewed, and held to show that an agreement for a survey of a boundary line was for the sole purpose of *straightening* a line long acquiesced in, and not for the purpose of establishing a *new* line.

Appeal from Mahaska District Court.—K. E. WILLCOCKSON, Judge.

FEBRUARY 17, 1920.

SUIT to restrain defendant from erecting his portion of a division fence on the plaintiff's land, instead of at the line as surveyed in pursuance of an agreement between the parties, resulted in a decree as prayed. The defendant appeals.—*Reversed.*

L. T. Shangle and D. C. Waggoner, for appellant.

Burrell & Devitt and Woodard & McCutchen, for appellee.

LADD, J.—The plaintiff owns the SE $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Section 20, and the defendant owns the W $\frac{1}{2}$ of the NW $\frac{1}{4}$ and the NE $\frac{1}{4}$ of the NW $\frac{1}{4}$ of the same section, the same being in Township 77 north, Range 15 west of the 5th P. M. The plaintiff's portion of the division fence between the SW $\frac{1}{4}$ of the NW $\frac{1}{4}$ and the SE $\frac{1}{4}$ of the NW $\frac{1}{4}$ was the north half, and the portion of the defendant was the south half. There had been a hedge along the north half, but only the stumps remained, and a modern fence was there in its stead. The south half of the fence appears to have bent or swerved somewhat to the east. In setting additional posts, defendant had crowded the line somewhat to the east, and the plaintiff had spoken to him several times about straightening the line. On April 2, 1916, plain-

tiff caused to be served on the defendant the following notice:

"You are hereby notified to meet the board of trustees of Union Township on the ground occupied by the partition fence between the SW $\frac{1}{4}$ of the NW $\frac{1}{4}$, Section 20-77-15, owned by you, and the SE $\frac{1}{4}$ of the NW $\frac{1}{4}$, Section 20-77-15, owned by J. H. Ashton, all in Union Township, at one o'clock P. M. of the 7th day of April, 1916. G. P. Efin, Township Clerk."

The parties met the trustees at the place mentioned, and, after viewing the fences, the latter ordered defendant "to renew and repair his part of said fences in such a manner as to make them lawful fences," and ordered J. H. Ashton "to remove worn and woven wire on the N $\frac{1}{2}$ of said fence between SE $\frac{1}{4}$ and SW $\frac{1}{4}$ NW $\frac{1}{4}$, Section 20-77-15, that being his part of said fence." Though reciting in the record that they examined the fence between the NE $\frac{1}{4}$ and SE $\frac{1}{4}$ of the quarter section, no order was made concerning the division fence between these forties. Someone then suggested that it would be a good time to straighten out the fence, and, it being said the trustees could not do this,—that they should have a surveyor,—the township clerk drew up the "articles of agreement entered into this day between Jessie E. Crandall and John H. Ashton, to wit: We hereby agree to each put in a lawful fence as ordered by township trustees, on the line which shall be established by the county surveyor. We further agree to each bear his half of the expense of said survey and cost of the township board as fence viewers, said surveyor to be called by J. E. Crandall." Each party signed this agreement, and the county surveyor undertook to survey the two tracts, and, in so doing, fixed the south end of the division line between the south 40's, 4 feet west of where the old fence stood, and at the north end, 7 feet west of the north end of the old fence. He also fixed the north division line be-

tween the NE $\frac{1}{4}$ and the SE $\frac{1}{4}$ of the NW $\frac{1}{4}$ at 5 feet north of the old line at the west end, and 9 $\frac{1}{2}$ feet north of the old line at the east end. In September, the board of trustees directed the clerk to cause notice to be served on defendant to erect a lawful fence between the farms of the parties hereto, within 30 days. The defendant commenced the erection of a permanent fence on the line of the former fence; and, thereupon, this action was begun, enjoining him from so doing. It will be observed that the agreement does not describe what was to be surveyed, and, as defendant contends that only the north and south division line between the south 40's was contemplated, and this only for the purpose of straightening the fence, we look to the record to ascertain the intention of the parties. Neither party appears to have expressed any doubt or dissatisfaction with the line between the south 40's, nor with that between the NE $\frac{1}{4}$ and SE $\frac{1}{4}$ of the quarter section. The only change either claims to have talked of was straightening the fence between the SW $\frac{1}{4}$ and the SE $\frac{1}{4}$ of the quarter section. The plaintiff testified that he acquiesced in the demand for a survey made by defendant; and the latter, after saying that plaintiff had complained for several years about defendant's fence being over on his land, and had suggested that it be straightened, testified that, after the fences were viewed, he proposed that it would be a good time to straighten; that one of the trustees or the clerk replied that they had no right to do anything of that kind, and that the proper way was to get a surveyor; that the contract was then drawn and signed.

"Q. That contract was to straighten out the crook in the fence? A. That is what it was for."

On the other hand, plaintiff swore that:

"There has been dissatisfaction, as near as I can remember, from 5 to 7 years; never disputed the line,—the old line,—I never disputed the corners. I never disputed

them. The fence was on the line when I came there, about five or six years ago. Crandall set new posts from the center of his part of the north and south fence south about 10 rods. His hand was setting posts and leaving the old fence stand, putting the fence over on me about three feet. I said, if he was going to put new posts in there, to take out the old fence and put the new ones where the old ones were: That was in the forenoon. In the afternoon, he pulled up those posts he had set, and took the old fence out. I supposed they were going to put the fence in the old line, on the straight line. I came back after dark. It was too dark to see, any more than I could see there was a fence there, and the posts were over on me. I do not know that I ever said anything about that. That commenced on the south end of his new fence, then kind of run, kind of circled off, and came three feet on me, and, at the wind-up, they set the posts over on me for about two feet. I did not make any complaint about it, until I wanted Crandall to put in a new fence, and I called the trustees there then. I wanted the fence straight, where he had set the posts over on me: that is all the contention I had about the fence."

On cross-examination, he estimated that the fence was over on his land, at the farthest, 3 feet, and for a distance of 8 rods, and declared that:

"It leaves a crooked line. I did not dispute the line that was there when I came there. I did not dispute the old line before the survey."

Eflin, the township clerk, swore that:

"Mr. Ashton said he was satisfied with the line as it was, but what he required was that the fence be straightened and repaired; and Mr. Crandall said he was ready to put in his fence, but he wanted to know where the line was, and kept insisting he wanted to know where the line was. Q. What fence were they talking about, when the agreement was signed up,—for a survey on what line? A. My

understanding was that they were talking about the fence in dispute, which included both the fences. This conversation took place in the presence of the board, J. E. Crandall, and Mr. Ashton, on the ground of the line fence. When the agreement was written up, we were at the south end. Ashton and Crandall were talking, as I stated; they were talking about both lines. Ashton stated there was a crook in the fence, and Crandall said he wanted it surveyed. He didn't say he wanted it surveyed so as to take the crook out of the line. The disagreement between these men was in relation to the condition of the fence on both lines."

In the light of this evidence, there can be no doubt as to what was intended. Neither party was concerned about the boundary lines between the 40's, nor the corners. Not only that, but they were satisfied with the location of the lines. The only controversy was as to whether the fence was on the north and south line. Defendant admitted that it was over six inches. The plaintiff thought it over as much as three feet, at one place. This was the controversy to be settled by the survey, and this before the fence was put in. But one fence had been ordered to be renewed or repaired, so as to become a legal fence, and that was the one along this line. That was the one the parties were talking about in connection with the survey. This is the deduction to be drawn from the township clerk's testimony, even when what was said, rather than his conclusion therefrom, is considered. The survey, as made, was not contemplated by the parties. When the line recognized by the adjoining owners for more than 40 years is surveyed, doubtless the fence will be constructed without further controversy. The petition should have been dismissed.—*Reversed.*

WEAVER, C. J., GAYNOR and STEVENS, JJ., concur.

A. A. COOPER WAGON & BUGGY COMPANY, Appellee, v. NATIONAL BEN FRANKLIN INSURANCE COMPANY, Appellant.

INSURANCE: Waiver and Estoppel Based on Criminal Act. Waiver and estoppel result from the act of an insurer in issuing a policy and accepting the premium, with knowledge that the insured was then carrying other insurance in companies *not authorized to do business in this state*, and later attaching a rider to the policy authorizing such insurance, even though the attaching of such rider was a criminal violation of the Standard Policy Act. (Sec. 1758-b, Code Supp., 1913.)

NEW TRIAL: Appeal from Order Granting—Reversal. Error results from the granting of a new trial, when the evidence is not in controversy, and the record affirmatively shows that, as a matter of law, plaintiff cannot, in any event, recover.

INSURANCE: Agents—Scope of Employment. Policy-issuing agents have authority to attach riders to the policy authorizing additional insurance in companies *not* authorized to do business in this state.

INSURANCE: Knowledge of Company. An insured need not trace knowledge of a material fact beyond the duly empowered agent of the company with which he deals.

Appeal from Dubuque District Court.—J. W. KINTZINGER, Judge.

FEBRUARY 17, 1920.

ACTION to recover upon three policies of insurance. Verdict for the defendant. On application of the plaintiff, a new trial was granted. Defendant appeals.—*Affirmed*.

Seymour Edgerton and George T. Lyon, for appellant.

Hurd, Lenehan, Smith & O'Connor, for appellee.

GAYNOR, J.—The defendant issued three policies of insurance, insuring the plaintiff against loss by fire, one dated November 26, 1915, for \$2,400; one dated December 15,

1915, for \$2,500; and the third dated December 24, 1915, for \$5,000, each expiring one year from date. The property covered by these policies was destroyed by fire on the 10th day of February, 1916. On the 16th day of December, 1916, this action was begun to recover for the loss. The policies were identical in form, and differed only as to dates and amount. Each was in the standard form prescribed by Section 1758-b of the Supplement to the Code, 1913. The amount sought to be recovered is \$9,465.59, with interest from June 26, 1916.

The defendant, answering, admits that its business was and is the issuing of fire insurance policies, in which it contracts and undertakes to indemnify those insured under its policies against loss or damage to the property described in its policy; alleges that it was fully authorized to do such business in Iowa, and that, at the time the policies in question were issued, it had, and now has, an agent and place of business in Dubuque, Iowa; admits that it issued the policies sued on, that it issued them in consideration of premiums paid therefor, but subject to the conditions named in the policy. It further admits that riders were attached to each of the policies on December 24, 1915, January 11, 1916, and February 4, 1916, respectively, and that the same were attached to each of the said policies on these dates. It further admits that, on the 10th day of February, 1916, the property covered by the policies was damaged or destroyed by fire; that due and legal notice of said fire and of the alleged loss under said policy was given to the defendant, pursuant to the terms of the policy; and that due and legal proofs of loss were furnished it, as required by the policy. It further admits that the amount of its liability, if any liability there is under the policy, is the sum mentioned in plaintiff's petition, to wit, \$9,465.59, with interest.

1. INSURANCE:
waiver and es-
toppel based on
criminal act.

With these admissions, the defendant, however, pleads defensively that the policies were void at the time the fire occurred, for that each provided that, unless otherwise provided by agreement of this company, the policies shall be void if the insured now has, or shall hereafter procure, any other contract of insurance, valid or invalid, on the property covered in whole or in part by the policies; that the only other provision of the policies allowing other contracts of insurance on the property is the following:

"It is hereby agreed that the insured may obtain other additional insurance in companies *authorized to do business in the state of Iowa.*"

The defendant alleges that, on and prior to February 4, 1916, and thereafter, until the happening of the fire, plaintiff had other contracts of insurance on the property in companies *not authorized to do business in the state of Iowa*; and says that it never authorized plaintiff to carry additional insurance in companies not authorized to do business in the state of Iowa, and had no knowledge that plaintiff was doing so; that, by reason thereof, each of said policies became null and void, under the conditions and terms of the policies themselves, and were not in force, and, therefore, not enforceable at the time the fire occurred. The defendant further alleged that it had no knowledge or notice that its agent at Dubuque, Iowa, Chester A. Ruff, had consented to the attachment of any riders to the policies, authorizing the plaintiff to take additional insurance in companies not authorized to do business in the state of Iowa; that any permit given by Chester A. Ruff to do so was given without the knowledge and consent of the defendant; that the granting of such permission, if granted, was beyond his power, and not within the scope of his authority as agent.

Plaintiff replies that the last rider, of the date February 4, 1916, became a part of the policy, and contained the provision "additional insurance permitted," without

any limitation as to whether the additional insurance should be in authorized companies or not; that this rider provided simply, "other insurance permitted;" that this rider was attached under an agreement between the plaintiff and the defendant company, made through its agent, Chester A. Ruff, and was attached to each policy on the 4th day of February, 1916.

Plaintiff further replied, by way of estoppel, that Chester A. Ruff is and was the recording agent of the defendant at Dubuque, Iowa, and the one by whom the original policies were issued; that the said Chester A. Ruff, while acting for the defendant in issuing the policies and attaching the riders, knew that plaintiff was carrying, and intended to carry, and continued to carry, insurance on the property covered by these policies, in companies not authorized to do business in the state of Iowa, and knew that plaintiff, in procuring the rider of February 4, 1916, procured it to supersede the riders of December 24th and January 11th, which limited additional insurance to companies authorized to do business in the state of Iowa, and acquiesced and consented to insurance in companies *not authorized to do business in the state of Iowa*; that defendant issued the policies and received the premiums with knowledge that plaintiff was, at that time, carrying additional insurance in companies not authorized to do business in the state.

Upon the issues thus tendered, the cause was tried to a jury, and a verdict returned for the defendant. On motion of plaintiff, a new trial was granted, and from this, defendant appeals.

For reasons which will appear later in this opinion, the action of the court in setting aside the verdict and granting a new trial was right, unless it appear affirmatively in

the record that the plaintiff can, in no event, succeed in the suit. That is, if, under the record, with the law correctly stated, and without error in the trial, the plaintiff cannot recover on the showing made, the court ought not to grant a new trial; for, if that be so, the jury has done what the court should have done at the close of all the evidence, and the plaintiff is not prejudiced. The granting of a new trial will be reversed in this court when it affirmatively appears from the record that the plaintiff is not entitled to recover, under any theory of the evidence. We do not mean by this that, in appellate review, this court weighs the evidence and determines for itself whether, under the evidence, in its judgment, the plaintiff is entitled to recover under the record made; but we do say that, where there is no controversy in the evidence, and the record as made affirmatively shows that, as a matter of law, plaintiff cannot recover in any event, then it is error for the trial court to set aside a verdict against the plaintiff; for it cannot be said to be prejudicial error to deny to one what in no event he has shown himself entitled to receive.

This brings us to a consideration of the evidence, not for the purpose of determining whether or not the plaintiff is or is not entitled, from our viewpoint, to recover, but whether or not there was a fair question for the jury, under the record made, as to plaintiff's right to recover, and for the purpose of further determining whether or not the court sent the case to the jury without undue burden and handicaps on the plaintiff in his effort to present the case to the jury for its consideration. It is the contention of the defendant that the undisputed evidence shows that plaintiff is not entitled to recover in this suit, and that the court, therefore, erred in setting aside a verdict against the plaintiff and in favor of the defendant.

It will be noted that the only defense urged to plaintiff's right to recover upon these policies is that it took and carried additional insurance in companies not authorized to do business in the state of Iowa, in violation of the terms of the policies. In issuing the policies in question, the defendant used the standard form of policy provided for by Section 1758-b of the Supplement to the Code, 1913. This form of policy provides, in Subdivision 1:

"It is hereby agreed that the insured may obtain \$—— additional insurance in companies authorized to do business in the state of Iowa."

Section 1758-c provides:

"Any insurance company, its officers or agents, or either of them, violating any of the provisions of this act, by issuing, delivering or offering to issue or deliver any policy of fire insurance on property in this state *other or different from the standard form*, herein provided for, shall be guilty of a misdemeanor," and provides a fine for the first and second offenses, and further provides: "But any policy so issued or delivered shall, nevertheless, be binding upon the company issuing or delivering the same."

Section 1758-d provides:

"Nothing contained in this act nor any provisions or conditions in the standard form of policy provided for herein, shall be deemed * * * to prevent any insurance company issuing such policy, from waiving any of the provisions or conditions contained therein, if the waiver of such provisions or conditions *shall be in the interest of the insured.*"

Code Section 1749 provides:

"Any person who shall hereafter solicit insurance or procure application therefor shall be held to be the soliciting agent of the insurance company * * * issuing a policy on such application or on a renewal thereof, any-

thing in the application, policy or contract to the contrary notwithstanding."

Section 1750 of the Code of 1897 provides:

"The term agent used in the foregoing sections of the chapter shall include any other person who shall in any manner directly or indirectly transact the insurance business for any insurance company complying with the laws of this state. Any officer, agent or representative of an insurance company doing business in this state who may solicit insurance, procure applications, issue policies, adjust losses or transact the business generally of such companies, shall be held to be the agent of such insurance company with authority to transact *all business within the scope of his employment*, anything in the application, policy, contract, by-laws or articles of incorporation of such company to the contrary notwithstanding."

The record discloses, without any question, that Ruff was the agent of this company, and had an office at Dubuque for the transaction of the business of this company; that he had a right to issue policies for the company; that these forms of policies were sent to him already signed by the officers of the company; that he filled them out, attested them as agent, and delivered them to the plaintiff; that thereafter, some controversy arose between the plaintiff company and Ruff as to whether or not the provisions of the policy were broad enough to allow additional insurance in companies not authorized to do business in the state of Iowa. It appears that plaintiff procured and had this agent attach to the policies a waiver of any claim that the taking of additional insurance in companies not authorized would vitiate the policy. This, interpreted, was an agreement on the part of the company to permit plaintiff to carry additional insurance in companies not authorized to do business in Iowa. Thereafter, this contract or this waiver was canceled by this agent, by drawing a pen through the

same. Thereafter, the plaintiff, not being satisfied, caused Ruff to add to the policy the rider of February 4, 1916, which gives to the plaintiff the right to carry additional insurance, without any limitation in the rider as to the character of the companies in which the additional insurance had been or should be placed, or without any expressed limitation upon the right to carry insurance in companies not authorized to do business in the state of Iowa. It is true that the previous riders, attached on December 24th and January 11th, did limit the assured to companies authorized to do business in Iowa, but not as originally prepared; but the limitation to companies authorized to do business in Iowa was added there by the agent by the use of a typewriter: that is, the agent added, after the words "additional insurance permitted," as originally prepared, these words: "In companies authorized to do business in Iowa." That was the condition of these policies at the time plaintiff procured the rider of February 4, 1916, above referred to. The jury could well find that this rider of February 4th was attached with the understanding that it gave to the plaintiff the right to carry insurance in companies not authorized to do business in Iowa. The very fact that the limitation placed in the preceding riders was omitted from the last rider, suggests that this was the understanding of the parties. It appears that, at the time these policies were issued, and at the time this last rider was attached, plaintiff did have additional insurance in companies not authorized to do business in the state of Iowa. It is the contention of the plaintiff that this was known to the defendant's agent, Ruff, at the time the policies were issued, and at the time these riders were attached; and there is evidence supporting this contention.

Under this record, it is apparent that Ruff was the agent of the defendant company in the issuing of these policies, and issued the policies in this suit. Within the

3. **INSURANCE:**
agents: scope
of employ-
ment.

scope of this agency is found the right to attach riders to the policy, such as were attached here. He acted for the company in the issuing of these policies, and acted for the defendant in attaching the riders. Within the scope of his employment was included the right to attach riders to the policies. The section heretofore quoted provides that such agent is clothed with authority to transact all business within the scope of his employment. That Ruff had a right to issue policies and to bind the company by the policies issued, a right to attach riders to the policies, such as are in controversy here, we think is not questioned. Whether questioned or not, the right existed, under the provisions of Section 1750, heretofore quoted. His knowledge, while transacting the business of the company, was the knowledge of the company, in respect to the matters in which he was called upon to act for the company. The agreement of the company was to the effect that other insurance might be taken by the assured upon the property covered by the policies issued. Other insurance was taken, and the right to take the other insurance was given by the contract of insurance. The only claimed violation of this provision contended for, is the taking of other insurance in companies not authorized to do business in Iowa. The jury could well find that the defendant's agent, Ruff, knew, at the time the policies were issued, that the plaintiff had insurance in companies not authorized to do business in Iowa. The jury could well have found that Ruff knew this at the time he attached the rider of February 4th. This rider of February 4th destroyed the inhibition against other insurance. It granted the right to take other insurance. It did not limit the right to take other insurance to companies authorized to do business in Iowa. This fact was known to the agent, Ruff. The company could act only through agents. Consent could be given only by authorized

agents. It is not questioned that it lay in the power of this agent, Ruff, to permit other insurance.

The contention that Ruff had no right to permit other insurance except in companies authorized to do business in Iowa, is predicated upon the thought that the standard form of policy provides for additional insurance only in companies authorized to do business in Iowa, and on the further thought that the statute places an inhibition upon any change in form from the standard form. It is argued that, inasmuch as the statute itself makes it a misdemeanor to issue a policy not in conformity with the standard form, it cannot be assumed that it was within the scope of Ruff's employment to agree or consent to that which involved the company in penal liability. But the statute itself provides that, notwithstanding the fact that the policy issued does not conform to the standard, the policy, nevertheless, is binding upon the company; and the statute itself authorized the company to waive any provision in the standard policy, if the waiver of such provision or condition were in the interest of the insured. The insured had, at the time the policies were issued, and at the time this last rider was attached, insurance in companies not authorized to do business in Iowa. The jury could well find that a waiver that protected him from forfeiture by reason thereof was to his interest, and that Ruff knew this at the time the policies were issued, and at the time the rider of February 4th was attached. It is not to be assumed that the company was playing fast and loose with the insured in this matter. It is not to be assumed that the agent, acting for the company, was playing fast and loose with the insured at the time he issued the policies, and at the time he attached the riders. If the agent, Ruff, at the time he issued the policies, knew that the defendant had other insurance in companies not authorized to do business in Iowa, as said before, his knowledge was the knowl-

edge of the company. If, with this knowledge, the policies were issued, and the premiums received, the act of issuing the policy and the receiving and retaining of the premiums estops the company from claiming that additional insurance in companies not authorized to do business in Iowa voids the policy. Good faith required the company to act promptly and repudiate its obligation if, on the 4th of February, as is contended now, the policies were void because of the fact of additional insurance in companies not authorized to do business in the state of Iowa. Instead of acting, and repudiating its policies, it attached the rider of February 4th, omitting from the provisions the limitation which it says now invalidates the policies and renders them void. When Ruff attached this rider of February 4th, we must assume that he was acting in good faith. The jury could have found that he knew that plaintiff had this objectionable additional insurance. In attaching this rider, he eliminated the limitation against this objectionable insurance. It is idle for him to say that he did not know what this rider contained. It was attached by him, and at the request of the insured. He is bound to know its contents, and his knowledge is the knowledge of the company. The plaintiff was not bound to trace knowledge beyond the agent of the defendant with whom he dealt. Notice to the agent was notice to the company. The riders might have provided expressly that the insured could take additional insurance in companies not authorized to do business in the state of Iowa. This would not invalidate the policies under the statute hereinbefore cited. The policy would be still binding on the company. Further, though the policies provided expressly that no additional insurance should be taken upon the property covered by these policies, except in companies authorized to do business in Iowa, that provision might be waived, and the waiver would be binding on the company, under the provisions of the statutes here-

inbefore set out. Such waiver would be clearly for the benefit of the insured, and, being for the benefit of the insured, could be made by the company, and, when made, would be binding on the company.

There is no provision in the statute as to how waiver should be made. In *Lake v. Farmers' Ins. Co.*, 110 Iowa 473, it is said:

"The test [of a waiver] is whether the acts and conduct of the insurer are inconsistent with the intention to insist on strict compliance with the terms of the policy and statute. The waiver is put on the ground that an insurer whose conduct is such as to induce the insured to rest under a well-founded belief that strict performance with a condition will not be insisted on cannot, in good faith, afterwards set up as a bar to recovery."

The plaintiff was a foreign company. It secured the right to do business in the state of Iowa. It had a right to do business in the state of Iowa. It placed the agent here to transact that business for it. He was, in every sense, the general agent of the company, with authority to transact its business in the state of Iowa. It was a corporation. It can act only through agents. Its agents are its hands, its eyes, its feet. What its agent does in respect to the matters committed to his charge, is the act of the company, and binds the company just as effectually as though the company were a living and breathing entity, with power to act for itself, and acted. It is idle to say that the company did not know that which was within the knowledge of its authorized agent. All it can know must come to it through this avenue, and the knowledge of its agents is its knowledge. The act of the agent, within the scope of his authority, is its act. It cannot repudiate the act of its agent and receive the benefits which flow from the act. If Ruff knew, at the time he issued these policies, that the plaintiff had insurance in companies not authorized to do

business in Iowa, then the company knew that fact. When Ruff issued the policies to the plaintiff, his act in so doing was the act of the company, and done with the knowledge which Ruff had, touching the subject-matter. When the policies were issued and the premiums paid, they were issued and the premiums accepted and retained with knowledge that plaintiff had insurance in companies not authorized to do business in Iowa. To accept the premium and issue the policies would be a clear fraud upon the plaintiff, if the contention of the company here made is sustained. The plaintiff had no dealing with any agent of the company except Ruff. It had no dealing with the company at all, except through Ruff. Ruff was the *alter ego* of the company in this whole transaction, so far as the plaintiff was concerned. The waiver was complete when it was affirmatively shown, to the satisfaction of the jury, that Ruff had knowledge that the plaintiff was carrying insurance in companies not authorized to do business in Iowa at the time the policy was issued and the premium paid. Further, it was a clear waiver of any inhibition of the policy against the carrying of additional insurance in companies not authorized, when Ruff re-affirmed the policies by attaching the rider of February 4, 1916. The defendant is estopped to say the policy is void when, with knowledge of the fact that the plaintiff was carrying insurance in companies not authorized to do business in Iowa, it issued the policies and accepted the premiums. It was a clear waiver of any inhibition in the policy against insurance in companies not authorized, when it attached the rider of February 4th, for by this act it indicated to the insured that the policies were then in force, and not repudiated because of the inhibition. Ruff testifies: "I had authority to issue policies I saw fit." A. A. Cooper, of plaintiff's company, testified:

"I said to Ruff that we had insurance in unauthorized

companies, and he said he knew it; that it was common talk that we were carrying unauthorized insurance."

This was before the rider of February 4, 1916, was attached. However that may be, there was a clear conflict in the evidence as to the knowledge of Ruff of the fact that the plaintiff was carrying unauthorized insurance prior to February 4, 1916.

The court, in its instructions to the jury, eliminated from the consideration of the jury the legal effect of the knowledge of the agent who acted for the company in the transaction of the business involved in the

4. INSURANCE:
knowledge of
company.

issuing of these policies, and carried the impression to the jury that a burden rested on the plaintiff to show knowledge to the com-

pany, in some way other than and distinct from that which came to the company through its agent, in transacting the business, and conveyed to the jury the impression that the consent of the company must be shown in some way independent of the knowledge and consent of Ruff, its duly authorized agent, and, among other things, said:

"If you fail to find from a preponderance of the evidence that the plaintiff did not know that the defendant's agent (Ruff) had no authority to consent to such unauthorized insurance, then it will be your duty to find your verdict for the defendant," and further: "If you fail to find from a preponderance of the evidence in this case that the plaintiff company did not know that the defendant company would not consent to the issuance of such policies, if the plaintiff was carrying other additional insurance in companies not authorized to do business in the state of Iowa, then, and in that event, it will be your duty to find your verdict in favor of the defendant."

Upon the whole record, we say there was a fair question for the jury as to the right of plaintiff to recover, upon the issues tendered, and a burden was laid upon plain-

tiff, in the presentation of the case to the jury, which the plaintiff was not required to carry.

Upon the whole record, we think the court was right in setting aside the verdict, and in granting a new trial. Its action is, therefore,—*Affirmed*.

WEAVER, C. J., LADD and STEVENS, JJ., concur.

W. F. HAWN et al., Appellees, v. WILLIAM MALONE et al.,
Appellants.

MORTGAGES: Transfers Subject to Mortgage—Duty of Vendee to

- 1 Pay. A vendee who takes conveyances of land subject to specified existing mortgages thereon must pay such mortgages if the amount thereof was retained by him out of the purchase price, and parol evidence is admissible to show the actual consideration paid.

EVIDENCE: Parol as Affecting Writing—True Consideration Paid.

- 2 Parol evidence is admissible to show the true consideration paid by a vendee for incumbered land,—to show that the amount of existing incumbrances was deducted from the purchase price,—and thereby to indicate an implied promise by vendee to pay such incumbrances.

CONTRACTS: Express Not Excluding Implied. There may be an

- 3 implied contract on a point not covered by an express written contract.

MORTGAGES: Discharge by Vendor—Recovery Over Against Ven-

- 4 dee. A vendor of land who, subsequent to the conveyance, has been compelled to discharge an incumbrance on the land because of the vendee's failure to perform his implied promise to discharge it, may not recover of the vendee more than he paid to effect the discharge—may not compromise the claim, and then charge the vendee with the full face of the claim.

Appeal from Guthrie District Court.—J. H. APPLGATE,
Judge.

FEBRUARY 17, 1920.

PLAINTIFFS claim to have conveyed a tract of land to the defendants, subject to certain incumbrances thereon which were deducted from the purchase price, and which plaintiffs were compelled to pay; and this action is brought to recover the amount thereof.—*Affirmed.*

F. E. Gates and George B. Lynch, for appellants.

Robbins & Bonn and R. O. Garber, for appellees.

STEVENS, J.—On October 21, 1912, plaintiffs were the owners of 400 acres of land in Charles Mix County, South Dakota, and the defendants, of a 240-acre tract in Polk County, Iowa. On that date, they entered into a written contract, by the terms of which plaintiffs agreed to convey the Dakota land to the defendants, and the defendants, to convey the Polk County land to plaintiffs. A deed was executed by plaintiffs on October 28th, reciting a consideration of \$28,000, containing the following provision:

1. MORTGAGES:
transfers sub-
ject to mort-
gage: duty of
vendee to pay.

“It is understood and agreed and between the parties hereto that William Malone and J. W. Gray accepts this deed subject to two mortgages a first and second mortgage aggregating sixteen thousand one hundred dollars on the above-described land after March first, 1913.”

The deed of defendants bears date October 23d, is in the usual form of warranty deed, and recites a consideration of \$26,400. The deeds were delivered on a later date. The reason for the delay was that the contract gave defendants 15 days in which to inspect the Dakota land before it became finally binding.

The incumbrance of \$16,000 upon the Dakota land was made up of three mortgages, instead of two, as follows: A first mortgage of \$5,000, a second mortgage of \$5,000, and a third mortgage, executed by plaintiffs, for \$6,100. The Polk County land was unincumbered, but mortgages aggre-

gating \$16,000 were placed thereon by plaintiffs, the proceeds of which, except \$1,000, were paid to defendants. Default was made in the payment of the third mortgage upon the Dakota land, and suit was brought against plaintiffs on the note secured thereby. This suit was compromised and settled by plaintiffs' paying \$2,000 to the holder of the note, whereupon plaintiffs commenced this action, demanding payment of the full amount of the note, the petition alleging that same was deducted from the agreed purchase price of the Dakota land. The court, however, limited plaintiffs' recovery to the amount paid in settlement of the suit brought against them.

The principal controversy between the parties is over the admission by the court of parol evidence to show the consideration claimed by plaintiff to have been paid for the

2. EVIDENCE:
parol as affect-
ing writing;
true considera-
tion paid.

Dakota land, counsel for appellant taking the position that the contract is conclusive upon every matter touching the negotiations and exchange of properties, and must be construed as an agreement for the exchange of equities only. Both parties appeal. The defendants are designated in the record as appellants, and we will first dispose of the questions raised by them.

Plaintiffs' cause of action is stated in two counts. In the first, they allege that they sold the Dakota land to defendants at an agreed price of \$70 per acre, or the aggregate sum of \$28,000, subject to the incumbrances thereon, which were deducted from the purchase price, and demanding judgment for \$6,100; and in the second count, they allege that defendants orally agreed that the whole consideration of \$28,000 should not be paid for the Dakota land in cash, but that the amount of the incumbrances should be deducted from the consideration, and that defendants were to pay the incumbrances, including the \$6,100 mortgage. As stated above, the contract allowed defendants 15 days in

which to inspect the Dakota land. Within that time, the defendant Gray went to South Dakota, and thoroughly inspected the land, on which one of the defendants at the time resided. There is some conflict in the evidence as to whether he was dissatisfied with the land or the improvements, but it is agreed that he refused to consummate the deal unless defendants were paid an additional \$500.

As appears from the portion of the contract quoted above, plaintiffs agreed to execute mortgages upon the Polk County land as follows: One for \$10,000, and one for \$4,500. A \$6,000 mortgage was executed, however, instead of the \$4,500 mortgage. After defendant Gray declined to consummate the trade, unless an additional \$500 was paid, plaintiffs agreed to raise the \$4,500 mortgage to \$6,000, if defendants would loan \$1,000 to plaintiffs. On October 29th, a contract was entered into to that effect. No other money, except the \$1,000, was paid by either party, and this sum was applied in part by defendants to the payment of interest due on the Dakota mortgages, together with taxes, which plaintiffs agreed to pay.

The court upon the trial permitted plaintiffs and other witnesses, over the objections of defendants, to testify to the alleged oral agreement. Later, however, upon motion of counsel for appellant, this issue was withdrawn, and the jury instructed to disregard the evidence, in so far as it tended to show an oral agreement.

Plaintiffs and C. J. Jordan, a real estate agent with whom both tracts of land were listed for sale, testified that a value of \$110 per acre was agreed upon for the Polk County land, and of \$70 per acre for the Dakota land; that the matter was fully talked over; and that the consideration expressed in the deeds was the amount agreed upon between the parties at the time the deeds and contract were executed. The evidence is in sharp conflict as to what took place before and at the time of the execution of the written in-

struments, but no claim is made by counsel for appellant in his assignment, brief points, or argument that the evidence, if admissible, is insufficient to sustain the verdict, and, therefore, we have no occasion to review it in detail.

I. The law is well settled in this state that the vendee to whom mortgaged real estate is conveyed, subject to such mortgage, without any agreement, express or implied, to pay the same, is not personally liable therefor; but, if the incumbrance is deducted from the purchase price agreed upon between the parties, without an express agreement to assume and pay the same, an agreement to that effect will be implied, and, if the vendor is compelled to pay any part of such incumbrance, he has a right of action against vendee therefor. *Northwestern Nat. Bank v. Stone*, 97 Iowa 183; *Foy v. Armstrong*, 113 Iowa 629; *Marshall Inv. Co. v. Lindley*, 156 Iowa 6; *Lamka v. Donnelly*, 163 Iowa 255; *Halvorson v. Mullin*, 179 Iowa 293.

If, however, the transaction involves the mere exchange of equities in respective tracts of land, and values are considered only, if at all, for the purpose of adjusting differences, no such implication will arise. Defendants allege in their answer, and assert in argument, that the competent evidence in this case brings it within the latter rule. The general rule that parol evidence is not admissible to vary, contradict, or alter the terms of a written instrument does not exclude evidence offered to show the true consideration paid for the land. Parol evidence is admissible for that purpose. The original contract signed by the parties does not recite a consideration, but simply states "that the parties of the first part (defendants) have this date sold and agreed to convey, or have conveyed, to parties of the second part or their heirs or assigns, the following described real estate located in the county of Polk, state of Iowa and described as follows;" and that "party of the second part agrees to convey the following described real estate to the

party of the first part." The deeds, however, which were executed at the same time, recite the consideration stated above. If the written contract controls, and parol evidence is inadmissible for the purpose of showing the true consideration for the sale of the Dakota land, together with the facts and circumstances surrounding the parties at the time,

from which an agreement on the part of defendants to take care of the incumbrances might be implied, then a new trial must be granted. A contract will not be implied, where an express contract between the parties in reference to the same matter is shown.

"This rule only applies, however, where the express and asserted implied contract relate to the subject-matter, and where the provisions of the express contract would supersede those of the other." 13 Corpus Juris 243.

We find nothing in any of the decisions of this court cited by counsel for appellant, holding contrary to the conclusion arrived at in this opinion.

The plaintiff in *Aufrecht v. Northrup*, 20 Iowa 61, alleged in his petition "that the plaintiff, in consideration of the sum of \$200, paid by the defendant to plaintiff, and at the same time of a promise made by defendant to plaintiff, as in said deed and contract written, that he, the defendant, would pay the said school fund claim." The deed was attached to the petition as an exhibit. A demurrer to the petition was sustained, upon the ground that it did not appear upon the face of the petition or deed that defendant had promised to pay the mortgage debt. The demurrer was sustained, and the ruling of the court properly affirmed upon appeal.

Hull & Co. v. Alexander, 26 Iowa 569, holds only that, where real estate is sold "subject to the mortgage," the vendee is not bound to pay the same.

Lewis v. Day, 53 Iowa 575, when carefully analyzed, is

in harmony with all of the other cases cited above. Plaintiffs in that case sold the defendant certain real estate in the city of Des Moines, on which there was a mortgage, which it is claimed defendant agreed to pay. Delivery of a deed containing a clause to that effect was offered and declined by the defendant. The deal was not consummated, and plaintiff brought suit for damages. There was a trial and verdict for the defendant, and plaintiff appealed. The court, in the course of the opinion, said:

"The question in the present case is materially different from this. The written contract either did, or did not, contain a stipulation to the effect the defendant should pay the Hartford mortgage. If it did, the proposed amendment and evidence was immaterial. If it did not, it is evident to our minds the parol proof offered would have a direct tendency to add to, or vary, the legal effect of the contract. It makes no difference that the offer was to show that the mortgage was deducted as a part of the purchase price. For the appellants claim the law to be, if the mortgage was deducted from the price agreed to be paid, a promise by the defendant to pay the mortgage will be implied. If this proposition be true, the legal effect of the proposed evidence would be to add to the writing such implied promise; or rather, it would follow as a legal conclusion from the established fact. If such a conclusion would not follow, then the proposed evidence would be immaterial."

In other words, the court held that nothing could be added to the contract by parol, either by proof of an oral agreement to pay the incumbrances, or of such facts as would establish an implied contract to do so. In concluding the opinion, the writer recognized the rule under consideration. It is there said:

"What would be the rule if the mortgaged property had been exhausted, and the plaintiffs compelled to pay any

portion of the debt secured by the mortgage, is not in the case."

Lamka v. Donnelly, supra, *Bradley v. Hufferd*, 138 Iowa 611, *Rice v. Hulbert*, 67 Iowa 724, are in harmony with the other cases cited. The holding in *Bristol Sav. Bank v. Stiger*, 86 Iowa 344, is approved in *Halvorson v. Mullin*, supra. Both cases recognize the general rule, and the decision in each case is based upon the failure of proof.

The test for determining whether there has been a sale or exchange of property is whether there was a fixed price at which the exchange was to be made. If there was a fixed price, the transaction is a sale; if not, an exchange. *Fagan v. Hook*, 134 Iowa 381; *Lamka v. Donnelly*, supra. In the latter case, the court said:

"It is a familiar doctrine, and the authorities are in harmony upon the proposition, that, even where there is a mortgage upon the land at the time of the sale, and the vendee retains out of the purchase price a sufficient amount to meet the mortgage, even without an expressed agreement to that effect, he will be held to have assumed the payment of the mortgage, and is personally liable for the amount to the mortgagee, and would be clearly liable to his vendor for the amount of the mortgage, in the event the vendor was required to pay it. This is upon the theory that, the grantee having retained a certain portion of the purchase money belonging to his grantor for the purpose of meeting an obligation of his grantor, he is bound, both in law and equity, for the amount of the consideration so retained to someone; either bound in the property which he receives, or bound personally. If, by the action of his grantor, he and the land are relieved from the obligation, then the grantor becomes entitled to the balance of the unpaid purchase money."

We think this case comes within the familiar rule that parol evidence is admissible for the purpose of showing the real consideration, and that the contract offered in evidence

is in no wise altered or modified thereby. It is silent as to the consideration; and, while some inference may be drawn from the language thereof that the parties intended only an exchange of equities, this is evidentiary only, and not conclusive. The terms of the alleged implied contract do not contravene the terms of the written contract. Defendants abandoned the Dakota land, leaving plaintiffs to pay or compromise the \$6,100 incumbrances for which they were personally liable. The evidence was in dispute as to the value of the Dakota land, but plaintiff W. F. Hawn testified that they paid \$65 per acre for it in March, 1912. The whole transaction, together with the circumstances surrounding the same, was admissible for the purpose of showing the true consideration and the intention of the parties.

II. The conclusion reached above disposes of all questions raised on defendants' appeal, except the contention that their motion for a new trial should have been sustained, upon the ground that the admission of the testimony of the witnesses to establish a parol agreement was necessarily prejudicial to them. Most of the evidence offered was admissible upon the question already discussed. It is true that evidence improperly admitted may be of a character inherently prejudicial, the withdrawal of which from the jury by the court under proper cautionary instructions to disregard the same does not cure the error; but the testimony in question is not of that character.

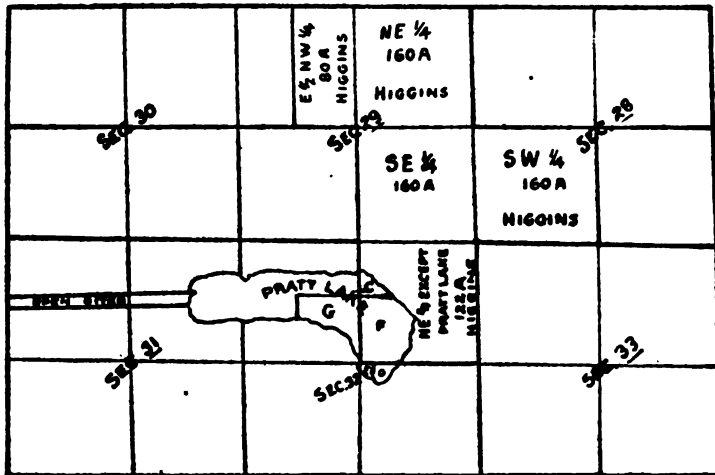
III. The sole question presented upon plaintiffs' appeal is whether they should have been permitted to recover the full amount of the note, or only the amount paid by them. The only portion of the purchase price lost by plaintiffs was the amount paid in settlement of the \$6,100 note. By the repayment of this amount with interest, they received the full purchase price for their land, and were not entitled to recover more. It follows that the judg-

4. MORTGAGES:
discharge by
vendor: recovery
over
against vendee.

was within the meander lines of the lake bed. The action of the executive council was taken with a view to and for the purpose, undoubtedly, of making effectual the purposes authorized by the act, and plaintiff is charged with notice of this purpose. It was under this act that the lots were sold, and title passed to the plaintiff.

Though these matters are not set out in the petition, we are told in the petition, to which demurrer was filed, that the land was platted and sold by the state of Iowa under the *authority of said chapter*. We must assume that all was regularly done by the executive council before sale was made of the lots in the bed of the lake, and we must assume that the investigation preceding the sale, and all that was done under the chapter up to the time of the sale, was done in accordance with and in fulfilment of the spirit and purpose of the act under which the council proceeded.

We herewith submit a plat of Pratt Lake, and of the territory surrounding it.



This plat shows the land owned by the plaintiff, and shows that only a portion of the land owned by plaintiff bordered on the lake as it originally existed. This land

is found in the northeast quarter of Section 32. The lots purchased by the plaintiff, as shown by the plat, are in the bed of the lake. We take it from the allegations of the petition that the plaintiff owned all the other land, shown upon the plat to be his, at the time he purchased these lots in the lake. He purchased and now owns Lots C, D, E, F, and G, in the lake bed. Lot C contains 9.91 acres; Lot D, 5.41 acres; Lot E, 3.56 acres; Lot F, 19.35 acres; Lot G, 17.49 acres. After plaintiff purchased these lots, a drainage district was formed, known as Drainage District No. 19, with an outlet at the west end of the lake. The purpose of the drainage district, among other things, was to drain the water from this lake. After the district had been organized for the purpose aforesaid, the plaintiff filed a claim for damages with the board of supervisors, alleging that he owned the land on the east end of the lake, abutting on the lake, and the lots in the lake bed; that he used the abutting land for stock farming; that the water was accessible for stock, and was of great value to his land; that he had built a lodge for hunting and fishing on the border of the lake, which he used during the hunting and fishing seasons; that the lake is stocked with fish, and that ducks and geese come there in the fall; that he has sown a portion of the lake with wild rice, that it may be attractive as a hunting and fishing place. The board of supervisors refused his claim for damages; he appealed to the district court; the district court denied his claim; and he appeals here.

The question presented is whether or not, under the facts as they appear in this case, plaintiff is entitled to be allowed anything as damages on account of the draining of the lake.

The right of the legislature to confer upon the executive council power to drain meandered lakes within the state, is not questioned in this case. Indeed, the whole argument assumes the right in the legislature to authorize

the executive council to take the action which it did. So we give no consideration to any question that might arise upon the suggestion that the power was not within the state to drain these meandered lakes. We turn, therefore, to the act of the general assembly under which the executive council acted, in doing the things herein shown to have been done by it.

Section 1 authorized and empowered the executive council of the state to survey the meandered lakes and lake beds within the state, and sell the same, as hereinafter provided, and to determine what lakes shall be maintained as the property of the state, and what meandered lake beds, belonging to the state, may be drained, improved, demised, or sold.

Section 2 provides that, upon the presentation of a statement signed by not less than 50 freeholders (having the qualifications provided for in the act), stating that any meandered lake or lake bed in such county is detrimental to the public health or the general welfare of the citizens of the county, and that it is unwise to maintain such meandered lake or lake bed as a permanent body of water, and that the interest of the state will be subserved by draining and improving such lake bed, the governor shall, within a specified time thereafter, appoint a competent engineer, who shall examine the situation or condition of the lake or lake bed, make a survey and plat thereof, and ascertain whether its location is such that it can be drained or improved, and make a full report to said council of the area, depth of water in the lake, and its general physical condition, accompanying his report with his plat, field notes, and profile of his survey.

Section 3 provides that, upon receipt of the report of the engineer, the executive council shall determine whether such lake or lake bed shall be maintained or preserved as the property of the state, or whether the same shall be drained and improved, and the land included within the

meander lines thereof sold, and may take evidence upon the question, to the end that the question may be properly determined.

Section 4 provides that if, upon such hearing, the executive council determines that the lake or lake bed ought not to be drained, demised, or sold, the same shall be kept and maintained as the property of the state, for the benefit of the general public. But if the council determines that it is to the interest of the state and the general public that the lake or lake bed, concerning which the statement is presented, be drained, improved, demised, or sold, it may permit the same to be drained, under the provisions of the drainage law of the state.

Section 5 provides that, in the event the executive council determines that the lake or lake bed should be drained, improved, demised, or sold, it shall have the right, either before or after such lake or lake bed is drained, to sell and convey, by deed or patent, the land lying within the meander lines of such lake or lake bed; and authority is given to the executive council to make such sale or sales in behalf of the state.

Section 6 provides that, after the lake or lake bed has been surveyed, and the land within the meander lines subdivided, and a plat filed with the secretary of state, the county auditor of the county in which the lake or lake bed is situated shall have the same appraised by a commission (designating the parties eligible to act upon the commission).

Section 7 provides that, after the appraisement has been so made, received, and filed, the executive council shall offer the *land* composing such *lake bed*, and included in such survey and appraisement, for sale, and shall give to the abutting property owners the first right to purchase.

Under this statute, the plaintiff's lots were sold by the executive council. We take it, therefore, that, before this

sale was made, a petition was filed with the executive council, substantially as required by Section 2 of the act, stating that the continuation of the lake was detrimental to the public health and the general welfare of the citizens of that county; that it was unwise to maintain such meandered lake or lake bed as a permanent body of water; that the interests of the state are best served by draining and improving it; that, upon this, under the authority given in Section 1, action was taken by the executive council, and we must assume that the action was bottomed on the statement or petition which called for its action. It was thus before the executive council to determine, after the report of the engineer, whether such lake or lake bed is detrimental to the public health, and whether the best interests of the state will be subserved by maintaining or preserving it, or whether it is of such character that its further preservation as a body of water is inimical to the public welfare, and especially to the citizens of the county. When it is determined that the best interests of the public and of the people of the county will be served by drainage, the council then may sell the lots in the bed of the lake, without first draining the lake. The executive council, under this statute, could not act, until they determined, first, whether a continuation of the lake was inimical to the best interests of the public; for Section 4 says that if, upon such hearing, the council determines that a lake or lake bed ought not to be drained, demised, or sold, the same shall be kept and maintained as the property of the state, for the benefit of the general public. But if the council determines that it is to the interest of the state and the general public that the lake or lake bed, concerning which the statement has been presented, should be drained, it may permit the same to be drained under the provisions of the drainage act. The lots may be sold before any action is taken towards actual drainage. The very purpose of action on the part of council

is to conserve the public health by removing a body of water from the surface of the ground, detrimental to the public health, or to the general welfare of the citizens of the county; and this rests on a finding that it is unwise to maintain such lake as a permanent body of water. When one buys land under a lake so condemned by the executive council under the authority of the statute, he knows that the waters above the land purchased are inimical to the best interests of the public, and that the state, through its properly authorized officers, has determined, while it was yet, as we must assume under this record, the owner of the land, that the same should be drained, in the interest of the public good. He buys it, therefore, with knowledge of the fact that the executive council has taken action to have the lake drained, and the price paid for the land is undoubtedly measured by this fact. Before plaintiff acquired any interest in the bed of the lake, the executive council, acting for the state, had determined that the draining of the waters from the lake would serve the interests of the public generally, and especially of the citizens of the county. Before plaintiff acquired any interest in the bed of the lake, while it was yet, as we must assume, the property of the state, the state consented to such drainage, and the plaintiff is charged with knowledge of this fact. So, under no circumstances could plaintiff claim any damage, if any, resulting to him as the owner of lots in the bed of the lake, by reason of the removal of the waters from the bed of the lake. His only basis for any claim for damages must rest on the thought that he owned land abutting upon the lake before and at the time this action was taken by the executive council, looking to the drainage. So the question presents itself: Assuming that the state had a right to drain the waters of the lake, did the plaintiff have such a vested interest in its waters that they could not be drained without compensating him for the incidental damages that might arise to him by rea-

son of such drainage?

At the time the action of the council was taken, the lake, within its meandered lines, it was assumed by both parties, belonged to the state. The state consented to its drainage. Plaintiff had no vested interest in or private right to the waters of the lake. See *Board of Park Commissioners v. Diamond Ice Co.*, 130-Iowa 603. When the executive council found the fact to be that

2. EMINENT DOMAIN: acts not constituting a "taking." a continuation of the waters in the lake would be inimical to the best interests of

the public, especially of the people of the county, it found a fact which, under the act, justified the draining of the lake. Thereafter, the waters of the lake, to all intents and purposes, became as surface water—a public enemy, to be dealt with as such. This lake was a mile long, and somewhat over a quarter of a mile wide, and shallow. The finding of the executive council that the continuation of the lake, as such, was inimical to the best interests of the public, is not questioned. That the lots in the bed of the lake were sold subject to drainage, is made manifest by this record. That the plaintiff bought the lots with knowledge of the fact that the lake was to be drained, must be assumed, because he is charged with knowledge of what was done by the executive council, and of the proceedings that led up to and justified its final action, and of its final action. It will be noted that no part of the purposed ditch touches plaintiff's land. It is not the purpose to construct any ditch into or upon plaintiff's land. No part of plaintiff's land will be taken for the construction of the ditch. The only purpose of the drainage is to remove the water within the meandered lines of the lake. If plaintiff desired to retain any part of the waters of the lake upon the lots purchased by him from the state, he must build his own retaining walls. He cannot use the land of others as retaining walls for the water which he desires to keep. As

said in *Talcott Bros. v. City of Des Moines*, 134 Iowa 113:

"Acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking, within the meaning of the constitutional provision. * * * It is the very essence of government, and fundamentally so, that private rights shall at all times be held subordinate to the public good. And to this every citizen is held, as by imperative decree, to have given his consent."

There is no doubt that, when plaintiff bought these lots in the lake bed, it was with the thought that the waters above the lots belonged to the state, and would be drained away. The lots themselves would be of no value to the plaintiff unless the water was removed therefrom. In the purchase of the lots, he is held to have consented to the scheme inaugurated by the executive council for the drainage of the waters off these lots, and he cannot be heard to complain that the purpose inaugurated by the executive council, under the authority of the statute, which he assented to in the purchase of these lots, has been carried out, nor can he base any claim for damages resting upon that ground. The sale of these lots by the state and the purchase by the plaintiff was in contemplation of the very thing he now objects to, and upon the doing of which he predicates his right to damages. The state sold the lake bed, not as a lake bed, but as land, and plaintiff bought it as land, properly platted and laid out, and not as a lake bed. The land, as such, became valuable only upon drainage, and could only be drained by opening channels from the lake through which, by the action of gravity, the water would be removed. The act itself provides that the lake bed—not the lake—may be sold before drainage. Drainage is the principal thing. The sale of the land was made in contemplation of drainage. By the act of purchase, the

plaintiff consented to the drainage. The drainage was for the public good. We think that much that was said by this court in dealing with the facts in *Talcott v. City*, supra, is apropos to the consideration of the questions here involved.

Upon this record, we find that plaintiff had no vested interests in the waters of the lake, entitling him to have the lake maintained *in statu quo* for his benefit, based simply on the ground that he owned lands abutting upon the lake. We find that, in purchasing these lots in the lake, after they had been platted, and after the continuation of the lake had been condemned by the executive council, as inimical to the best interests of the public, plaintiff consented that the waters be drained from the land purchased, the effect of which was to remove the water from his property abutting upon the lake.

Upon the whole record, we think the court was right in denying plaintiff any claim for damages, and its action is—*Affirmed.*

WEAVER, C. J., LADD and STEVENS, JJ., concur.

IN RE ESTATE OF HENRY BRESLER.

ELMER E. BRESLER, Appellee, v. FLORENCE PERSHEL et al.,
Appellants.

WILLS: Testamentary Capacity—Evidence. Evidence reviewed, and held insufficient to support a verdict of mental incompetency to execute a will.

SALINGER, J., dissents.

Appeal from Monona District Court.—J. W. ANDERSON,
Judge.

FEBRUARY 17, 1920.

CONTESTANTS filed objections to the probating of the will of Henry Bresler, deceased, claiming that he was not of sound mind, and that there was undue influence used by the widow and a son, who is the proponent. The case was tried to a jury, and, at the conclusion of the testimony of both proponent and contestants, proponent moved for a directed verdict in his favor, which was sustained. The contestants appeal.—*Affirmed.*

Crary & Crary and Prichard & Prichard, for appellants.

Lutz & Lutz and Harding & Harding, for appellee.

PRESTON, J.—The will was executed on May 4, 1918. Testator died on May 22, 1918, at the age of 72 years. His estate consisted of 160 acres of land in Monona County, personal property estimated at about \$1,500, and some money in the bank; also 160 acres of land in Kansas, which was incumbered for \$1,400. Appellants claim that there are inequalities in the will; but they concede that, under the authorities, even though it is unreasonable, that is not alone a ground for refusing probate. They say, however, that this is a circumstance to be considered, in connection with the other evidence bearing on the condition of testator's mind. The will gives the use of the Iowa land to his wife for life, and gives her, outright, all moneys and credits, and the household furniture. To his son Elmer E., the proponent, he gives the reversion in the home place; also, all stock, farm machinery, and other personal property, except the money, etc., given to his wife, provided that the son should pay all indebtedness against the property, except the indebtedness on the Kansas land. He directs that the executor sell the Kansas land, and pay the mortgage thereon, and divides the residue of such proceeds equally between his daughter, Florence Pershel, and his son Calvin Bresler. The two last named are the contestants.

The value of the Kansas land is not shown. It was attempted, on rebuttal, but, because it was not rebuttal, the court excluded it. Appellees contend that the alleged inequalities in the will are not as great as contended by appellants, for that the appellants receive their share out of the sale of the Kansas land, which is to be done soon, while proponent's enjoyment of his interest in the Iowa land is postponed until his mother's death. The daughter moved to Oklahoma some 18 years ago. She testifies that her brother Calvin, the contestant, was on good terms with her father most of the time. Neither of these children saw their father often. The son Elmer, proponent, saw his father almost daily, and the father seems to have been greatly interested in Elmer and his children. The provisions of the will in question are less favorable to Elmer than those of a prior will made by deceased which had been executed some time before, and was more favorable to the widow. The main point relied upon for reversal is that the evidence was such that the case should have gone to the jury on the question as to the mental condition of testator.

There are some circumstances shown in the record which frequently appear in elderly people who are seriously ill, and nearing the end. These, for the most part, have reference to the physical condition. These, of course, affect, to some extent, the mental. If it were the rule that, to make a valid will, a person's mentality should be 100 per cent, then but few wills could be sustained. Such is not the rule. We shall enumerate some of the more important circumstances shown by contestants, as tending to show incapacity, without going into details.

The testimony of the daughter and of some of the other relatives is much stronger than that of witnesses who are not related and not interested. Contestant Florence Pershel was not present at the time the will was executed. She was in Oklahoma that day. She had not seen her father for

six years, until April 12th, before he died. She saw him from that date on until April 26th, and, during that time, the doctors visited him four times. None of the doctors testified for contestants, and there is no evidence of medical witnesses in the record as to the nature and character of the physical condition of decedent, or the causes thereof, nor as to the effect thereof upon his mental condition. Mrs. Pershel further testified that, when she came to her father in April, after an absence of six years, she noticed quite a difference in her father. He was sick, in bad health, suffering, and weak, and she doesn't think his mind was good. He did not seem to care to talk. He did not know her boy. He would sit and stare; didn't pay attention to things around him; he looked out of the window one day, and asked who boys playing in the yard were. They were his grandsons. He would ask for his medicine, and afterwards declare he had not taken it, although sometimes he would get up and take it himself. He was an old soldier, and told war stories. He served all through the war, and received an injury to his arm. It was his habit for years to talk about things that transpired when he was fighting for his country, according to the daughter's testimony. In conversation, he repeated; talked more of things of the past. She came back on May 19th, which was after the execution of the will, and stayed until her father died. Deceased was suffering from his stomach and heart; used a cane or chair to walk across the floor. His weakness was increasing; his eyes were sunken; they were not bright as formerly. That was the last of April, before the will was executed. On cross-examination, she says she didn't know his condition on May 4, 1918, when the will was executed, and doesn't know the medicine he took. Deceased would sit on the porch, while she was there in April; seemed to enjoy it there; enjoyed being out. While she was there in April, she heard deceased talk with the son Elmer, about the farm

work; also heard Elmer's wife talking to deceased. She says:

"I understood what he was saying. There was nothing in the talk to Mrs. Elmer Bresler that indicated there was anything wrong about my father's mind, and I think I heard him talk to her possibly eight or ten times, or more, during the thirteen days. Had there been anything unusual, I would probably have remembered it, but I have no recollection of him saying anything unusual to Elmer. * * * Some days, father would be better, and some days, worse. He was on friendly terms with Mr. Rohde [one of the subscribing witnesses], and they would talk together. I never heard anything unusual on the part of my father when he talked to Mr. Rohde. My father would talk to him as neighbors usually talk when they meet."

She again says, in this connection:

"Had father said anything unusual or out of the way, I could have remembered it, but I remember nothing unusual. Q. You don't claim your father was out of his mind during your thirteen days' visit, do you, but it was through sickness and weakness, your father's mind was impaired? A. I claim his mind was weak."

Upon these facts, she was permitted to give her opinion as to the mental condition of her father, and that he was not of sound mind. The wife of contestant Calvin gave similar testimony, and states that these conditions continued during the first week of May, 1918, but says she never stayed all night at the Bresler home during the first week of May, and is not positive whether she went there once or twice with her husband during that week; not sure whether she was there with her husband the first week in May, or whether it was with Mr. Henry; was there two hours on the 4th, a part of which time she talked with her mother, in the house and yard. Doesn't remember the conversation of her father that day, except that he talked about

his strawberries; doesn't know what he did in the afternoon of that day, or what he talked about, or whether he was better or worse, that afternoon. Doesn't know what his condition was, at the time he made the will. She and her husband returned from Oklahoma in the spring of 1913, after several years' absence, and they did not visit her father for a year, although they lived within two miles of him. Visited him more after the fore part of 1916. A niece visited deceased on April 10th. He did not know her at first, but later said he knew her. They phoned for the doctor that day. At that time, his face was thin, and his eyes sunken. Another witness, a neighbor, testified that testator was poorly all winter; got weaker. Witness saw him in April, and he was weak and going down fast through April, until his death; noticed a difference in his conversation. His mind seemed to be considerably weakened; he seemed weaker in body and mind; his conversations were broken. Two or three other witnesses gave similar testimony, though some of it is not as strong as that we have set out, and nearly all qualified their evidence on cross-examination. One witness, who saw him on the morning of the 4th, says he does not know what the mental condition of deceased was, after he left him on the morning of the 4th, says he might have brightened up to such an extent, later that day, that he might be capable to transact business in the afternoon. Another of contestants' witnesses says, on cross-examination, that he visited deceased, May 11th; that deceased was in bed that day; that he saw him a week before the will was drawn. This witness says further:

"I noticed he grew perceptibly weaker, after he had taken to his bed, than when he was sitting on the couch. Up to the time he had taken to his bed, which seems to have been later than the time the will was made, he recognized me, of course, and I talked to him, and he would answer me intelligently. I could not give you the dates. Q. And

during all the times you talked to the old gentleman, when he was lying on the couch and before he had taken to his bed in sickness the last time, he was able to answer you intelligently, and ask questions intelligently? A. Yes, sir, fairly well, I think. He was an industrious, energetic business man. Q. Now, in all your acquaintance with him, in the winter before he had taken to his bed, and before the will was drawn, when you would ask him questions, he would answer them intelligently, as far as you recall? A. Yes, sir, I think so. Q. Of course, you do not recall any answer that he made that was unintelligent about business matters, that you know of,—that is true, isn't it? A. I don't recollect of anything in particular now. After the will was executed, and after he had taken to his bed, if shaken up out of the comatose condition, and he roused himself out of it, I do not recall any statements he then made that were illogical or unusual. When he woke up out of a comatose condition, he always seemed to recognize me, and that continued down to the very last of his life."

The foregoing is a fair statement of the general character of contestants' evidence. The banker who drew the will in question was a witness for proponent. He had known deceased for several years. Deceased himself dictated the will, a few days before it was signed, which was on the evening of May 4th. Deceased told witness about the prior will, and what changes to make. When witness was sent for, on the 4th, he took the will to the home of deceased, and read it carefully to him, a paragraph at a time, and deceased said it was all right. Witness destroyed the prior will at the direction of testator. No one was present at this time, except the widow and witness. Others had stepped out. Witness saw Rohde and Llise sign the will as witnesses. Deceased visited with him and the two witnesses to the will, three quarters of an hour. He says that deceased complained about his limbs' being swollen; that,

during the time they were visiting, as ordinary persons, there was nothing to indicate any lapse of memory; he did not repeat himself; there was nothing unusual in his looks, except natural failing health; he was a very sick man. Mr. Rohde, whose farm adjoins that of deceased, had known deceased for 30 years. He was with deceased, the night the will was signed, an hour or more; saw nothing unusual in his condition, although deceased was weak; saw nothing wrong with his mental condition, speech, or look. He testifies that deceased was of sound mind; that deceased had been sick about a month or six weeks before the will was signed. The other subscribing witness gave similar testimony. Another neighbor, who lived half a mile from deceased, saw him at different times during his sickness, and testifies that he didn't notice any change in his mind; that he was weaker; that he thought he was just as strong in his mind as always. The wife of proponent and the widow also testified. Without going into further detail as to the evidence, we are of opinion that the evidence is not sufficient to sustain a verdict for contestants, had the case been submitted to the jury, and that, therefore, the trial court rightly directed a verdict.

There is no evidence in the record as to the disease with which testator was afflicted, except the testimony of some of the lay witnesses as to his complaints. There is nothing to show any progressive mental disease. Deceased was better some days than others. None of those who were present at the time the will was executed, testify to a condition indicating mental incapacity at the time the will was executed. There is no evidence of undue influence. Without reviewing the cases bearing upon the question as to the mental capacity, we content ourselves with citing one or two of the more recent cases, wherein are cited a number of our cases. See *Byrne v. Byrne*, 186 Iowa 346; *In re Eddy's Will*, (Iowa) 173 N. W. 931 (not officially reported).

One or two minor matters are suggested in argument, but no errors are assigned, nor are there brief points thereon. On the whole record, we reach the conclusion that the judgment of the trial court ought to be affirmed. It is affirmed. Appellee's amendment to abstract was proper, and the motion to strike and tax costs thereof to appellee is overruled.—*Affirmed.*

WEAVER, C. J., EVANS and STEVENS, JJ., concur.

SALINGER, J. (dissenting). If this appeal involved anything other than whether there was capacity to make a last will, I have little doubt we would hold that, upon the evidence exhibited in the opinion itself, that there was a question for a jury. I think it is undeniable that the review here indulged in is a review *de novo*. If that be permissible, it might well be claimed that the conclusion reached is the right one. It may be conceded that, were we sitting as jurors, we would hold, on this evidence, that the will was valid. But, in my opinion, such review of the evidence on our part is treating this appeal as a chancery appeal, without saying so. On review of a verdict, or the refusal to submit to a jury, we should not determine what evidence shows or fails to show by our personal beliefs. On such review, the only question is whether reasonable minds may differ on what the evidence establishes or fails to establish. It is not to be denied, either, that this opinion is sanctioned by other of our decisions. My position is that those decisions should be overruled, because the Constitution prohibits what they permit. As said before, in my opinion, there is reasonable room for differing on whether the testator was or was not competent. I do not care to lengthen this dispute by a fuller analysis. Indeed, no enlargement would be helpful, because the testimony set out in the opinion itself seems to me to demonstrate that the conclusion reached is wrong. I wish but to add that this particular opinion runs true to type, also, in failing to give weight to such unnatural dis-

position as there may be. It is true that, if you once grant that a testator is sane, it becomes immaterial that he has made undue discrimination in his gifts. Once grant the testator is sane, and the courts cannot interfere because he has made an unnatural will. But when the inquiry is whether he be sane, the fact that his will is unnatural is circumstantial evidence that he was not sane. Once grant that the testator is competent to make a will, and the courts may not set that will aside, even though he disinherits his only child, with whom he has been on affectionate terms, that child being crippled, and left penniless because the father has willed his all to an utter stranger. As said, if it be admitted that the man who made such a will is sane, there is an end. But surely, that he made such a will would be very persuasive evidence of lack of capacity, when capacity was in inquiry instead of being granted.

IN RE ESTATE OF SMITH C. GORMLY.

IVY M. GORMLY et al., Appellants, v. SMITH W. TODD et al.,
Appellees.

WILLS: Testamentary Capacity—Evidence. Evidence reviewed, and held insufficient to support a verdict of mental incompetency to execute a will.

SALINGER, J., dissents.

Appeal from Woodbury District Court.—GEORGE JEPSON,
Judge.

FEBRUARY 17, 1920.

THIS is a will contest. At the close of contestants' evidence, the trial court directed a verdict for the proponents. The contestants appeal.—*Affirmed.*

Sears, Snyder & Gleysteen, Vail E. Purdy, and H. C. Harper, for appellants.

Kass Bros., Jepson & Struble, and Jepson & Stecker, for appellees.

EVANS, J.—The testator was Smith C. Gormly. At the trial, the contestants admitted the due execution of the will, and assumed the full burden of proof. The grounds of the contest were mental incapacity and undue influence. The testator died on January 25, 1919, at the age of 85 years. He was a bachelor. He had left his birthplace in Pennsylvania about 55 years ago, and had come to Sioux City, where he lived ever since. He was a ship carpenter by trade. During his residence in Sioux City, he never communicated with friend or relative in Pennsylvania. His near relatives were a brother and a sister. These both predeceased him. The brother was survived by two daughters, who are the contestants herein. The sister was survived by two sons, who are the proponents. The testator was thrifty and careful in his business affairs and frugal in his expenditures. He left an estate valued at between \$40,000 and \$50,000. This estate was devised by him to his two nephews, in unequal parts. The proponent Smith Todd, the namesake of the testator, received the residuary and larger share. Two years before his death, the testator had suffered an accident, resulting in a broken hip. This injury affected his general strength and health. For 20 years, he had been so hard of hearing that communication could be made to him only by writing. He would answer the written communication vocally. In the last weeks or months of his life, he developed heart trouble, and grew gradually weaker, until he died. The will was made on January 7th. On January 3d, his nephew, Smith Todd, had come to visit him. This visit resulted pursuant to correspondence initiated by the testator. After 50 years of

silence and of a lonely life, upon which at last the shades of night were falling, he wrote to this proponent the following letter:

"Sioux City, Iowa, Dec. 18, 1918.

"Smith Todd,

"Industry, Pa.

"I am writing to find out where you and Johnny Todd are living or if you are living at all. It has been about ten years since I heard anything from Beaver County. I used to take the Beaver Star and while it was running I got the Beaver County News, but it suspended about ten years ago and I have heard nothing from there since.

"Now, I am not writing much in this letter but if you and Johnny will write I will write of importance to both of you in my next letter. I don't know if John and your mother are living or not. Please answer soon yours and address 512 Pearl Str. Sioux City, Iowa."

Pursuant to the correspondence thus initiated, this nephew came to visit his uncle on January 3, 1919. The will was made four days later. His home at that time was at the Washington Hotel. The will was made at the testator's room in the forenoon of its date. In the evening, the testator was taken to the hospital, where he remained until his death. On the question of mental capacity, the evidence is very meager, indeed. The attending physician, Dr. Keefe, testified for the contestants as follows:

"I would say that Gormly's mind was enfeebled to the same extent his physical condition was,—very feeble,—when I called on him at the Washington House, and that gradually grew worse till death."

No other medical evidence was adduced; nor was there any stronger evidence of mental incapacity adduced from any witness. The testimony for the contestants affirmatively disclosed intelligent conversation through the medium of writing, and disclosed no derangement or abnormal

condition, other than the weakness, physical and mental, incident to his illness.

We are clear that the evidence was wholly insufficient to have justified a verdict adverse to the will on the ground of mental incapacity. No useful purpose would be served by our dealing with further details.

On the question of undue influence, there was evidence tending to show that the proponent was present when the will was made, and that the terms of the will were more or less discussed with him. This evidence was, of course, admissible, and has its significance, so far as it goes. But there is no evidence of undue influence exercised by him, unless it be found in the mere fact that he was the larger beneficiary of the will. This falls far short of proof of undue influence. That the testator intended to make him a beneficiary of his will is foreshadowed in the letter above quoted. There was no one behind that letter except the testator. That the correspondence thus initiated should have brought the nephew to the bedside of the uncle was consistent with good motives. His presence there, accordingly, was not the fair target of suspicion.

The trial court properly held that there was not sufficient evidence of undue influence to support a verdict. The order of the trial court is, accordingly,—*Affirmed*.

WEAVER, C. J., GAYNOR and PRESTON, JJ., concur.

SALINGER, J. (dissenting). Upon testimony disclosed by the opinion, and upon an examination of the record, I reach the conclusion that both mental capacity and undue influence were jury questions. The decision by the majority is another instance of making an exception in the law governing review on the law side. I know of no reason why review of mental capacity to make a will, and whether it was made without undue influence, should be treated as a

chancery appeal. My reasons for this dissent are more fully expressed in one addressed to the case of *In re Bresler's Estate*, 188 Iowa 458.

IN RE ESTATE OF PETER KLADIVO.

JOSEPH KLADIVO, Appellant, v. ED. SULEK, Administrator,
Appellee.

EXECUTORS AND ADMINISTRATORS: Conflicting Appointments

- 1 **in Different Counties.** An appointment of an administrator by the clerk or court of one county, based on a finding that the deceased was a resident of said county at the time of his death, is a *finality*, until set aside on appeal or *direct attack*, and *exhausts the power throughout the state in any other clerk or court to make another appointment* until the former order is so set aside.

EXECUTORS AND ADMINISTRATORS: Estoppel to Question II.

- 2 **legal Appointment.** The act of a validly appointed administrator in negotiating with an invalidly appointed administrator for the settlement of claims filed with the latter does not work an estoppel to dispute the validity of the appointment of the latter.

Appeal from Johnson District Court.—RALPH OTTO, Judge.

FEBRUARY 17, 1920.

SUIT by plaintiff, duly appointed administrator of the estate of Peter Kladio, deceased, by the district court of Linn County, to cancel the appointment of defendant as administrator of the same estate by the district court of Johnson County, resulted in the dismissal of the petition. The plaintiff appeals.—*Reversed*.

H. G. Walker and Rickel & Dennis, for appellant.

Hart & Hart and B. L. Wick, for appellee.

LADD, J.—Peter Kladio died intestate, November 22,

1913, leaving as his only heir, Joseph Kladivo. The latter filed his petition with the clerk of the district court of Linn County, alleging that Peter was a resident

1. EXECUTORS AND ADMINISTRATORS: conflicting appointments in different counties.

of that county at the time of his death, and left personal property of the estimated value of \$150. The petition was duly verified; and, on December 18, 1913, petitioner was appointed administrator, and duly qualified, letters of administration having been issued to him. Notice of his appointment was promptly published, and, on July 23, 1918, the court approved his final report, and, as administrator, he was discharged. In the meantime, and in May, 1916, John Benish, an alleged creditor of decedent's, filed a petition with the clerk of the district court of Johnson County, alleging the death of Peter Kladivo, that he was a resident of Johnson County at the time of his death, and that he was seized of certain described land, and left personal property not to exceed the value of \$50, and prayed that defendant, Ed. Sulek, be appointed administrator. Letters of administration were issued to Sulek in June following, and notice of his appointment was served by posting. Four claims were presented to him and filed, aggregating \$323.56, and, on October 24, 1917, the administrator Sulek filed a petition, praying an order for the sale of the land of which decedent is alleged to have died seized, to satisfy these claims and costs of administration. November 12, 1917, was fixed for date of hearing, and notice thereof served on Joseph Kladivo, October 31st previous. Whether hearing was had, we are not told; but, on December 15, 1917, Joseph Kladivo filed his petition with the clerk of the district court of Johnson County, alleging the death of his brother Peter, that the latter was a resident of Linn County, that petitioner was duly and legally appointed administrator of the estate left, and was still acting as such, that the district court of Johnson County was without power or

authority to appoint an administrator, and praying that the order granting letters of administration to Sulek be set aside, canceled, and held for naught, and that he be ordered not to proceed further. In his answer, Sulek denied that decedent was a resident of Linn County, and alleged that he was a resident of Johnson County at the time of his death, put in issue the jurisdiction to appoint, and pleaded that plaintiff was estopped from denying defendant's right to administer the estate. The law contemplates but one administration within the state, for Section 3265 of the Code provides that:

"The court of the county in which a will is probated, or in which administration or guardianship is granted, shall have jurisdiction co-extensive with the state in the settlement of the estate and the sale and distribution thereof; and a certified copy of any order, judgment or deed, affecting real estate in any county other than that in which administration or guardianship is originally granted, shall be furnished to and entered by the clerk of the district court of the county where such real estate is situated in the probate records of said court."

Either plaintiff or defendant, then, was entitled thereto, and in no event, both of them. As between several courts, jurisdiction to appoint an administrator of the estate of deceased persons attaches to the court invested with probate powers for the county of his residence at the time of his death. 1 Woerner on American Law of Administration (2d Ed.), Section 204. It is so declared by statute in this state. The first paragraph of Section 225 of the Code provides that:

"The district court of each county shall have original and exclusive jurisdiction to probate the wills of, and to grant administration upon the estates of, all persons who at the time of their death were residents of the county, and of nonresidents of the state who die leaving property within

the county subject to administration, or whose property is afterwards brought into the county."

In appointing an administrator under this statute, the court necessarily decides whether decedent was a resident of the county over which its jurisdiction extends; for, without so finding, it would be without jurisdiction to appoint. Decisions are not wanting in which it is held that, in a collateral proceeding, proof may be received, showing such finding erroneous; that decedent was not such resident of the county at the time of his death; and that the grant of letters of administration was void *ab initio*, for want of jurisdiction. *Perry v. St. Joseph & W. R. Co.*, 29 Kans. 420; *People's Sav. Bank v. Wilcox*, 15 R. I. 258; *Olmstead Appeal*, 43 Conn. 110; *Miller v. Swan & Brown*, 91 Ky. 36. But, as remarked in 1 Woerner on American Law of Administration (2d Ed.), Section 204:

"The more reasonable doctrine is gaining ground, and is now held in nearly all the states, that letters so granted, while they are voidable when properly assailed, are valid until revoked in a direct proceeding."

Coltart v. Allen, 40 Ala. 155; *In re Estate of Griffith*, 84 Cal. 107; *Tant v. Wigfall*, 65 Ga. 412; *Record v. Howard*, 58 Me. 225; *McFeeley v. Scott*, 128 Mass. 16; *Johnson v. Beazley*, 65 Mo. 250; *Bolton v. Schriever*, 135 N. Y. 65; *Lyne v. Sanford*, 82 Tex. 58. The probate court is a court of general jurisdiction in this state. *Reed v. Lane*, 96 Iowa 454; *Myers v. Davis*, 47 Iowa 325; *Read v. Howe*, 39 Iowa 553. See *Cooper v. Sunderland*, 3 Iowa 114; *Beresford v. American Coal Co.*, 124 Iowa 94.

Under Section 250 of the Code, the clerk of the district court is authorized to make "the appointment, when not contested, of resident administrators, executors, and guardians of minors, and the approval of any and all bonds given," and his action therein may be reviewed by the court, at the instance of an aggrieved party at the succeeding

term, and later, on good cause shown, and upon notice; and the record of such appointments, unless assailed and reversed, is "of the same force, validity and effect, and shall be entitled to the same faith and credit, as if made by the court or by the judge thereof." Section 252 of the Code. Its appointment of an administrator, if not appealed from or set aside, is to be treated, then, the same as though made by the district court; and the rule is well established in this state that an appointment so made cannot be assailed collaterally. In *Murphy, Neal & Co. v. Creighton*, 45 Iowa 179, the court, in appointing an administrator for the estate of a nonresident, held that the validity of such appointment might not be questioned collaterally by proving that no property of the decedent was in the county. This decision was followed in *Lees v. Wetmore*, 58 Iowa 170, and *Christy v. Vest*, 36 Iowa 285, which seems to express a different view, attempted to be distinguished. In *Seery v. Murray*, 107 Iowa 384, the controversy was between devisees over property of the estate, and it was held that the validity of plaintiff's appointment might not be drawn into question. In *In re Estate of King*, 105 Iowa 320, the application recited that deceased was a resident in a county other than the county of the court appointing, and this was in no manner contradicted; and, as the court could not have found him a resident of the county where the court appointing sat, the appointment was adjudged void. The rule prohibiting collateral attack, where the court appointing found the residence of deceased within its jurisdiction, was recognized in *Nash v. Sawyer*, 114 Iowa 742, announced in *Erwin v. Fillenwarth*, 160 Iowa 210, and reiterated in *In re Estate of Stone*, 173 Iowa 371. See *Cummings v. Lynn*, 121 Iowa 344. In *In re Estate of Rowe*, 179 Iowa 541, the attack was direct, the proceeding being to remove the administrator appointed by the district court of Woodbury County, for that the intestate resided in Monona County. In

Scrimgeour v. Chase, 145 Iowa 368, the point here considered was not raised. Assuming, as we must, that the probate court is competent to decide whether the facts are such as to confer jurisdiction, "it follows with inexorable necessity that, if it decides that it has jurisdiction, then its judgments, within the scope of the subject-matters over which its authority extends, in proceedings following the lawful allegation of circumstances requiring the exercise of its power, are conclusive against all the world, unless reversed on appeal, or voided for error or fraud in a direct proceeding. It matters not how erroneous the judgment: being *a judgment*, it is *the law* of that case, pronounced by a tribunal created for that purpose." 1 Woerner on Administration, Section 145.

The doctrine that administration granted in a county other than that of decedent's residence at the time of his death is voidable, rather than void, tends for conservatism, and will avoid largely the evil consequences which might follow in the wake of a different conclusion. Where the question, as in this case, is one of doubt as to the county to which administration belongs, there might be two administrations, debtors might be subjected to verdicts by different juries, and possibly two judgments for the same debt, but by different courts. Confusion might result as to the title of property, both real and personal. We are contented with the doctrine which has prevailed in this state for more than 40 years, and have no hesitancy in deciding that administration granted by the district court of Linn County may be assailed only by direct attack, and, until thus assailed and set aside, there can be no administration of the estate in any other county. In other words, there can be but one grant of administration on the same estate, and jurisdiction, having once attached, will continue until set aside on direct attack by someone interested in the estate. *In re Estate of Griffith*, 84 Cal. 107 (23 Pac. 528); *Chow v. Brockway*,

21 Ore. 440; *Pawling v. Speed's Executor*, 21 Ky. 580; *People, etc., to the use of Markham v. White*, 11 Ill. 341. See *Ramey v. Green*, 18 Ala. 771; *Watkins v. Adams*, 32 Miss. 333. In *Nash v. Sawyer*, 114 Iowa 742, this court laid down the rule that:

"If the person be dead, and a personal representative has been appointed, no other court in the same jurisdiction has authority to appoint another representative, and such second appointment may be collaterally attacked. If there be a representative for the deceased already appointed, no court sitting within the same state has authority, in the absence of statute, to appoint another."

Hooper v. Scarborough, 57 Ala. 510; *Post v. Caulk*, 3 Mo. 35 (Republication 3 Mo. 26). *Andrew v. Ivory*, 14 Grattan (Va.) 229 (73 Am. Dec. 355), was cited in support of this holding. In the last-named case, after declaring that the appointment of an administrator is voidable only on citation or appeal, and might not be questioned in any collateral proceeding, the court said:

"There must be an office, and that office must be vacant, in order to a valid appointment of a personal representative. Until then, there is, in fact, no 'subject-matter,' to be within the jurisdiction of the court. That subject-matter is, the appointment of a personal representative to a decedent who has none, and whose personal estate is, therefore, without an owner. The validity of an order making an appointment must depend on the existence of that state of things. And, though the court must inquire into these preliminary facts, and in some sense adjudge them, in every case in which it makes an appointment; yet the judgment, to that extent, is incidental and inconclusive. If, in fact, there be a decedent without a personal representative, an order of a court of general jurisdiction on that subject, appointing one, is as conclusive on the question of jurisdic-

tion of the particular case as on any other question arising in the case."

See *Griffith v. Fraizer*, 8 Cr. (U. S.) 1, 9 (3 L. Ed. 471). There, the court held that an administrator of an estate might not be appointed during the temporary absence of an executor. *Coltart v. Allen*, 40 Ala. 155 (88 Am. Dec. 757), was also cited, and the court reaches a like conclusion.

As there was no application made for the revocation of the letters of administration issued to Joseph Kladio by the district court of Linn County, and no revocation thereof, we have no occasion to revert to such proceedings to set aside such an appointment; but see 1 Woerner on Administration. Section 266 *et seq.* It is enough now to say that the plaintiff was the legally appointed administrator of the estate of decedent; and, since he was such, the letters issued to the defendant were absolutely void, and the proceedings had in the district court of Johnson County were without authority of law.

It appears that the plaintiff entered into negotiations for the adjustment of claims presented to the defendant as administrator, and filed with the clerk of the district court of Johnson County, and it is argued that he is estopped thereby from asserting the invalidity of the defendant's appointment. There is no pretense that anything plaintiff did induced Benish to apply for administration in Johnson County, or Sulek to qualify as administrator. All Kladio appears to have done was to negotiate settlement of the claims and costs of administration, and to pay over to Sulek several hundred dollars in money. The latter still retains the money, and there is no ground for saying that any prejudice has resulted from the negotiations, or from having

2. EXECUTORS AND
ADMINISTRATORS:
estoppel to question il-
legal appointment.

held the money. The defendant was not misled to his prejudice, and there was no estoppel. The court, in not granting the relief prayed in the petition, erred.—*Reversed*.

WEAVER, C. J., GAYNOR and STEVENS, JJ., concur.

NORA COTTER MCGUIRE, Appellee, v. WILLIAM HALLORAN et al., Appellants.

FIXTURES: Mortgagor and Mortgagee—"Permanent Improvements." An agreement to pay a real estate mortgagee, in possession, for "permanent improvements," does not embrace a grinding mill, nor a windmill tank, nor an interest in a rural telephone company, in the absence of evidence showing that such articles are a part of the land; neither does such agreement embrace an undivided interest in an ensilage cutter.

WORK AND LABOR: Value. The court may not, ordinarily, assume the value of service, in the absence of evidence bearing thereon.

CONTRACTS: Construction—"Actual Cost." An agreement by a mortgagor, out of possession, to pay a mortgagee, in possession, the "actual cost" of permanent improvements made on the premises, simply means that mortgagor will pay the *actual amount of money expended* by mortgagee—does not embrace a promise to pay mortgagee for his own personal labor.

MORTGAGES: Mortgagee in Possession—Rents. A mortgagee in possession, under an agreement to credit mortgagor with a specified annual rental, will be charged with the fair, reasonable rental from the date when he wrongfully refuses to permit the mortgagor to redeem.

WILLS: Construction—Support of Feeble-Minded Child. A provision in a will, making the support of a feeble-minded person a charge upon land, and, in effect, providing that such support should be on the land, and such as testator had given the child, is construed, and held not to justify a charge against the land equal to what a stranger would exact for such support.

Appeal from Lyon District Court.—WILLIAM HUTCHINSON,
Judge.

FEBRUARY 17, 1920.

ACCOUNTING in pursuance of an order therefor in *McGuire v. Halloran*, 182 Iowa 209, resulted in a decree fixing the amount owed by the plaintiff to defendants, March 1, 1919, at \$8,500, including the interest on a first mortgage of \$2,500, up to September 11, 1918, and directing the payment thereof prior to February 1, 1919, without interest, and, if not paid, directing special execution to be issued against the land. It was also ordered that the defendants support and maintain Maggie Cotter until March 1, 1919. Both parties appeal, plaintiff perfecting her appeal first.—*Affirmed.*

Herrick & Herrick and *William Mulvaney*, for appellants.

E. E. Wagner and *George J. Danforth*, for appellee.

LADD, J.—I. One Roger Cotter died testate, April 26, 1900, seized of 134.39 acres of land in the S½ of Section 6, in Township 39 north, Range 44 west, in Lyon County. Decedent was survived by a son and four daughters, two of whom were plaintiff and the defendant Kate Halloran, and, of the other two, Maggie was feeble-minded, and Mary was in ill health. By the terms of the will, the land above described was devised to plaintiff, but charged with the support and maintenance of Maggie and Mary Cotter so long as either of them might live, and this to be upon the farm, and "such support to be as in my lifetime I gave to my said daughters at my home." The will also required plaintiff, after satisfying a mortgage of \$2,500 on the farm and other debts, to pay Mrs. Halloran the sum of \$500. It was duly admitted to probate, and plaintiff took possession

of the premises thereunder, and cared for her sister Mary until her death, and for Maggie until March, 1907. In the meantime, she found it necessary, in order to discharge claims against the estate of decedent and expenses of her own, to execute, with the approval of the court, a mortgage of \$2,500 on the farm, and later executed another thereon. On the 1st of October, 1907, she entered into a written agreement with the defendants, under the terms of which the latter undertook to take up a certificate of sheriff's sale, and pay the taxes on the said land, it appearing that the mortgages last above mentioned had been foreclosed, and the land sold thereunder; and that plaintiff should repay amounts so paid, and also pay for keeping Maggie, \$12 per month, and \$500 in lieu of the legacy to Mrs. Halloran, with 8 per cent interest per annum from October 1, 1908; and she was to be credited \$415 per annum, as the rental of the premises. It was also stipulated that "the first party may make necessary permanent improvements, including tiling on said premises, which the second party shall pay for at actual cost, with 8 per cent interest from the time actually paid;" that plaintiff pay the defendants \$130 for keeping Maggie from March to October 1, 1907; and that defendants should account for the rent received for that year; and the latter were to be reimbursed for interest paid on the first mortgage. This instrument was construed, in *McGuire v. Halloran*, 182 Iowa 209, where it appears in full, to have been executed as security for the payment of money; and, as the testimony was insufficient to enable the court to declare an accounting between the parties, the cause was remanded therefor. After this had been done, defendants, on September 3, 1918, filed a statement of account, additional to that previously asserted up to October 1, 1910, which amounted to \$4,280.02, as follows:

Taxes from 1910 to 1916, inclusive	\$ 591.77
Interest paid from and including 1908 to 1916	1,725.00
Commission on renewing loans	250.00
Building fences and improvements	6,000.00
Keeping Maggie from October 1, 1910 ..	5,720.00

This last item was increased, by an amendment, to \$11,440, and the defendants ask for interest on the several amounts, making a total claim of \$18,566.79.

The correctness of the account, as stated by defendants, up to October 1, 1910, is not challenged by the plaintiff. We shall assume, then, that plaintiff was then indebted to defendants in the sum of \$4,280.02. The rent stipulated should have been applied on the \$130 owed for the care of Maggie, and in compensation for Maggie's support, and the payment of taxes, necessary repairs, and any balance on the interest accruing on the advances made. So applying the rent, during this period, interest on the balance of the amount paid for redemption, and that allowed in lieu of the legacy, at 8 per cent per annum, from October 1, 1910, up to October 1, 1914, is \$1,369.60. Under the order of the court in *McGuire v. Halloran*, supra, annual rent is to be allowed until the beginning of the suit, as stipulated in the contract. No rent had been credited in defendants' statement for 1910, and \$415 will be allowed for that year, and for the four years following. For this period, it amounted to \$2,075. Having enjoyed the use of the premises at the rental stipulated in the contract, they are not in a situation to object to bearing the burden therein imposed, and they will be allowed, for keeping and caring for Maggie, \$12 per month, as agreed in that instrument. They will be allowed \$596 for her care up to December 19, 1914. To that date, the defendant paid taxes to the amount of \$404.87. Adding the several amounts owed by plaintiff, we have a

total of \$2,370.47, and, subtracting the rent therefrom, there is left a balance of \$295.47. Interest is not allowed on taxes, as these should have been paid from the rents, and the promise to pay interest thereon, found in the contract, referred to those not met from the rents.

II. Counsel for defendants, at the beginning of their argument, set out a statement of their claim for improvements made on the premises, aggregating \$4,279.62. This includes \$232.79, which was included in the

1. **FIXTURES:**
mortgagor and mortgagee:
"permanent improvements."
statement covering items up to October 1, 1910, and should be deducted. It also includes a grinder mill at \$15, which does not appear to have constituted a permanent improvement, and this item will not be allowed. Nor is a tank at a windmill ordinarily attached to the land, and the item of \$18 therefor will be rejected. Admittedly, an ensilage cutter, as it belonged to four persons, and but a one-fourth interest therein was bought by plaintiff, is not to be regarded as a permanent improvement, and the charge of \$38.50 for a one-fourth interest therein should not be allowed. Nor can a share in a rural telephone company be regarded as in the nature of a permanent improvement, unless so shown to be, and the \$31 charged therefor is an improper item. Adding these items, we have \$335.29, which should be deducted from the total of defendant's statement, which would leave \$3,944.33. Included in these several items, also, are the following, for services rendered by defendant:

Hauling sand for hog house	\$ 75.00
Hauling brick for silo	25.00
Hauling furnace	35.00
Labor on house and hauling lumber	225.00
Labor on hog house	17.00
Labor on house in winter	125.00
Labor for sandpapering house	49.00
Labor on cement work on barn	142.00
Labor shingling barn	13.50

The charges for services rendered amount to \$706.50. Something over \$135 of this appears to be for hauling, and about \$500 for labor performed; and it appears from other items that over \$500 was paid to mechanics for labor done in making the improvements. There is no evidence in the record indicating that the sums charged were the reasonable values of the services rendered, and, in view of the amount paid for the services of others, the defendant will hardly be accused of underestimating the value of what he has done. Though the court said, in its opinion in *McGuire v. Halloran*, supra, that, in the accounting, "the defendant will be entitled to receive the fair value of such improvements as he may have placed on the land in good faith before this suit was begun," and that interest should not be allowed during their occupancy, the contract, as indicated above, provided that defendants might "make necessary permanent improvements, including tiling on said premises, which the second party shall pay for at actual costs, with 8 per cent interest from the time actually paid." Manifestly, the court, in referring to the "fair value" of the improvements, meant such value as ascertained under this portion of the contract. Surely, it was controlling, and the court must have intended that effect be given thereto. The parties, in the introduction of evidence, appear to have so construed what the court said, though unhappily

expressed, as having reference to the clause of the contract quoted; for there was no evidence introduced as to the present value of the buildings, save in showing the amounts paid for materials and labor. Only the defendant William Halloran testified on this subject, and his testimony was solely of what the materials cost, and what he paid for labor performed, and that the value of materials and labor was 35 per cent higher at that time than when the buildings were constructed. This would furnish some evidence of the value of the buildings, but they had been occupied for many years, and there was nothing to indicate their present state of repair, or whether they were so constructed or the designs such, in view of present requirements, as to render them equal in value to such cost. The

2. WORK AND
LABOR: value.

court can hardly be expected to assume, without any proof, that the amounts charged for services rendered by Halloran were the reasonable value thereof, or that the reasonable value of the improvements necessarily included such charges, and that there had been no impairment from long use.

The contract, as we think, rightly defines what plaintiff should pay for the improvements: that is, she "shall pay for the actual cost, with 8 per cent interest from the time actually paid." Manifestly, this has refer-

3. CONTRACTS:
construction;
"actual cost."

ence to the amount paid out by the defendants, and not to labor which they may have performed. In *McCoy v. Hastings & Bradley Co.*, 92 Iowa 585, "the cost price is said to be what is actually paid for an article." In *Sylvester v. Ammons*, 126 Iowa 140, it is said to be "what is actually paid or promised to be paid for an article." See *Hazelton Tripod-Boiler Co. v. Citizens' St. R. Co.*, (Tenn.) 72 Fed. 317, 321. In *Mayor and Aldermen of Newton, Petitioner*, 172 Mass. 5 (51 N. E. 183), the court said:

"'Actual cost' means real cost, as distinguished,

amongst other things, from estimated cost (*Lanesborough v. County Commissioners*, 6 Metc. 329), or from market price, which may include matters which do not enter into the real cost. *Alfonso v. United States*, 2 Story, C. C. 421; *United States v. Twenty-Six Cases of Rubber Boots*, 1 Cliff 580. The word 'cost' is of limited significance,—much narrower than 'damages,' for instance, which, in the case of laying out one railroad over and across another, has been held not to include compensation for the interruption and inconvenience to the business of the latter, occasioned thereby. *Massachusetts Cent. Railroad v. Boston, C. & F. Railroad*, 121 Mass. 124. In *Lexington & W. C. Railroad v. Fitchburg Railroad*, 9 Gray 226, the 'actual cost' of running trains was held not to include interest on cars, and to mean money actually paid out. And in *Alfonso v. United States*, under the revenue act of 1799, Chapter 128, Section 66, it has been held that the words 'actual cost' meant the actual price paid in a bona-fide purchase, and not the market value, thus excluding any idea of profit or return. See, also, *United States v. 16 Packages of Goods*, 2 Mason 48; *United States v. Tappan*, 11 Wheat. 419, 423. The object of the provision which we are considering was, it seems to us, in view of the relations of the parties to the work and to each other, to exclude in the accounting between them any profit, and everything except what fairly might be reckoned as a part of the real cost of the alterations."

Under the revenue laws of the United States, the actual cost is held to mean "the price given and every charge which attended the purchase, and the exportation paid or supposed to be paid at the place whence the article is exported." *Goodwin v. United States*, (Pa.) 10 Fed. Cas. 625. In *The United States v. Sixteen Packages*, (Mass.) 27 Fed. Cas. 1111, the court declared that the actual cost means "the true and real price paid for the goods upon a genuine"

bona-fide purchase." See *State v. Price*, 12 Wash. 653 (42 Pac. 120).

The intention manifested in the contract under consideration was that the defendants be reimbursed for whatever they actually paid out for improvements, and not for labor performed by themselves, whether in hauling or in doing other work, largely for their own convenience. In the former opinion, the court directed that no interest should be allowed, notwithstanding the language of the contract; and, of course, this is not inequitable, if defendants are not charged with the use of the improvements as part of the rental of the lands. Deducting the several items referred to from the total claimed, and there remains \$3,237.63, which is allowed for improvements.

III. The plaintiff should be allowed the reasonable rental of the land from December 19, 1914, to March 1, 1919. But one witness testified concerning the reasonable value of the use of the land, and he was of the opinion that the reasonable rental thereof during the year 1915 was \$5.50 to \$6.00 per acre; during 1916, from \$7 to \$8 per acre; during 1917, about \$8 per acre; and in 1918, from \$8 to \$10 per acre. The witness had not seen the land recently, and did not "take into consideration any special improvements," but "undertook to give about the value that lands—similar lands with similar improvements—would rent for," and testified that "he had rented unimproved land \$1 to \$1.50 less, because there were no buildings on it," and that "his idea was that the difference would be from \$1.50 to \$2.00 per acre." The evidence disclosed that there were improvements on the land in controversy before the defendants moved thereon, though not in good repair, and the evidence did not disclose what the land in such condition, and without improvements made by defendant, would rent for. We are inclined to think that plaintiff

4. MORTGAGES :
mortgagee in
possession :
rents.

should be allowed about \$1 less than the maximum rent, as estimated by the witness, and therefore compute the rent for 1915 at \$5 per acre, the rent for 1916 at \$7 per acre, the rent for 1917 at the same price, and the rent for 1918 at \$9 per acre, making altogether, for the four years, \$3,762.92. The plaintiff will be credited with this amount.

IV. In the will, under which plaintiff claims, the support and maintenance of Maggie Cotter were made a charge upon the farm devised to plaintiff, and therein testator required "said support to be upon the farm

5. WILLS: construction: support of feeble-minded child.

where I live, and such support to be such as in my lifetime I gave to my said daughters in my home." This was the measure of support which plaintiff was required to give her feeble-minded sister; and, in entering into the contract under the terms of which defendants undertook to care for this sister, and to so do at \$12 a month, the parties must have had in mind the provisions of this will, for the compensation was scarcely more than enough for her bare necessities. But for this provision of the will, one sister would have been under quite as much obligation to care for her as the other, and it must have been that this thought entered into the arrangement made between them. She was continuing in the home of the testator, and the measure of her compensation ought not to be that which would be fixed, were a stranger to undertake to care for her; and we are of opinion that, notwithstanding the evidence of what would be a fair price, were a stranger to take her in their home, under the peculiar circumstances, the defendants ought not to be allowed to exceed \$1.00 per day therefor, from the time of the beginning of the suit to March 1, 1919, or \$1,531.

V. In addition to taxes previously allowed, the sum of \$188.79 was paid for taxes of 1915 and 1916, and this should be credited defendants. They also claim to have paid \$1,725 as interest on the loan on the farm, which is

unsatisfied; and this item is unchallenged. Defendants are also entitled to credit for interest on the balance of \$4,280.02 from October 1, 1914, to October 1, 1918. Inasmuch as defendants were denying plaintiff's right to redeem, and were claiming ownership of the land, they ought not to be allowed more than 6 per cent interest during this period, which would amount to \$1,027.20. The total amount credited to defendants in this paragraph is \$2,940.99. In the account, as we state it, the defendants are credited as follows:

For balance to October 1, 1914	\$4,280.02
For balance to December 19, 1914 (under	
Par. 1)	295.47
For improvements	3,237.63
For care of Maggie from Dec. 19, 1914,	
to March 1, 1919	1,531.00
Items of last paragraph of opinion	2,940.99
	<hr/>
	\$12,285.11
By rent credited to plaintiff	3,762.92
	<hr/>
	\$ 8,522.19

This so nearly approximates the conclusion of the trial court that we are not inclined to disturb the same. The variance may be attributed to slight differences in computation of interest, or in passing on claims of doubtful propriety. Such a difference tends to confirm, rather than otherwise, the painstaking care and accuracy of the trial court in fixing the amount which should be decreed a lien on the land. The cause is remanded to the district court, with direction to ascertain the reasonable value of the care of Maggie from March 1, 1919, to the date of hearing; and to the amount so ascertained, there should be added the balance of \$8,500, and interest thereon at the rate of 6

per cent per annum from the date of the decree in the district court, and the interest, if any, paid on the existing mortgage on the land since March 1, 1919; and from the sum total of these items, there should be deducted the fair and reasonable rental value of the land since March 1, 1919. Decree will be entered, establishing a lien for this difference, bearing interest at the rate of 6 per cent per annum, against the land, fixing the time within which payment may be made, and providing for the issuance of special execution, if not paid within the period defined, and sale thereunder. Each party will pay one half of the costs in this court.—*Affirmed and remanded.*

WEAVER, C. J., GAYNOR and STEVENS, JJ., concur.

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E. E. MITCHELL, Appellant, v. JESSIE A. MITCHELL,
Appellee.

DIVORCE: Allowance Pending Suit—**Excessiveness.** Order for attorney fees and expense money reviewed, and held excessive.

Appeal from Mahaska District Court.—H. F. WAGNER,
Judge.

FEBRUARY 17, 1920.

PLAINTIFF appeals from an order allowing temporary alimony.—*Reversed.*

L. T. Shangle, Burrell & Devitt, and D. C. Waggoner,
for appellant.

C. C. Orvis and S. V. Reynolds, for appellee.

STEVENS, J.—The parties to this suit were married April 4, 1900, at Camden, New Jersey, and resided together in the city of Washington until September, 1906, when

plaintiff came to Iowa, ostensibly for the purpose of aiding in the settlement of his father's estate. He returned to Washington in March, 1910, and resided for a few days with his wife, when he again returned to Iowa, where he has since lived upon a farm in Mahaska County. The defendant had employment in the printing office in Washington from 1893 to 1918. During the time the parties lived together, plaintiff also worked in the government printing office. In March, 1917, defendant brought an action against plaintiff in Mahaska County for a divorce, which was voluntarily dismissed by her after the evidence was introduced. On September 3, 1918, plaintiff filed the petition in this suit, praying a divorce upon the ground of desertion. Defendant in turn, on December 31, 1918, filed a cross-petition, in which she also prays a divorce upon the ground of desertion, which was the ground alleged in her former petition.

The sole question presented for review is an order made by the court below on June 25, 1919, allowing defendant an additional sum as temporary alimony. An allowance was made and paid in the suit brought by the wife in 1917 in the sum of \$500. On January 2, 1919, the court in this action allowed and ordered plaintiff to pay to the clerk of the district court \$400, \$200 of which was to be paid to defendant's attorneys for suit money, \$100 for her support, and \$100 for attorney fees. This sum was promptly paid, and duly receipted for to the court. The order appealed from was the one entered June 25, 1919, and directed plaintiff to pay to the clerk immediately \$150 for defendant's support, and \$50 per month, commencing June 1st, until the trial was had therefor, together with the further sum of \$400 attorney fees.

From the foregoing statement, it will be observed that plaintiff has already, in the two suits, paid \$900, and by the order of May 22d, is required to pay \$550 at once,

and \$50 per month thereafter, until the proceedings have been disposed of.

Defendant states, in her affidavit in support of her application for an additional allowance, that she is in ill health, and out of employment; that her income is wholly inadequate for her support and to enable her to present her defense; and that plaintiff is worth from \$45,000 to \$60,000. Other affidavits tend to corroborate her claim, particularly as to her physical condition. Plaintiff recites, in his affidavit, filed in resistance to defendant's application, that he owns 119 acres of land; that he is heavily in debt; that his income is insufficient to pay his expenses, taxes, etc.; and that defendant is the owner of property in the city of Washington, worth from \$12,000 to \$15,000, from which she received a monthly income in excess of \$100. An affidavit, signed by the janitor of the apartment in which defendant resides, stating that she is apparently in good health, accompanies plaintiff's showing in resistance to the application. Plaintiff states in his affidavit that he is now, and always has been, willing to support defendant in his own home; that he has frequently solicited her to come to Iowa and reside with him, but that she has steadily refused to do so. Defendant, however, says that plaintiff at all times claimed that he did not have a suitable place in which to receive her, or in which to live; that he at no time offered to send her money to pay the expenses of a trip to Iowa; and that she has always been willing to live with him, under proper circumstances.

It appears without dispute that the action brought by defendant in 1917 was tried, and that, before a decree was entered, she voluntarily dismissed her petition, stating in open court that she would never live with plaintiff. She brought no witnesses from Washington, nor were depositions used in the trial of that case.

The situation of the parties has not so changed since

the order of January 2d as to justify the allowance of a further sum as temporary alimony. The allowance then made is sufficient to enable defendant to take necessary depositions and prepare her case for trial. It is not claimed that expense has been incurred by her attorneys or by her in the preparation of the case for trial, nor that more services have been rendered by her attorneys than are ordinarily rendered in a divorce suit, pending trial. As stated, defendant, in 1917, announced her intention of not thereafter living with plaintiff. If, upon the trial, it appears that she is entitled to a further allowance of alimony, the court, in its discretion, will doubtless allow her a proper sum; but, as the only ground alleged by either upon which a divorce is prayed is desertion, we feel that the \$900 already paid defendant is quite sufficient to enable her to make a very complete showing upon the issues involved.

The allowance in the former trial was substantial, and should have enabled her to present her case properly to the court. So far as appears, she offered all the evidence she desired at that time, and voluntarily dismissed her case. The parties have not since resided together.

Plaintiff cannot dispose of his land, so as to defeat the collection of judgment for alimony, if an order, upon final hearing, is entered. A proper allowance can then be made for attorney fees.

We reach the conclusion that the order appealed from should be set aside and canceled. The order and judgment of the court below is, therefore,—*Reversed*.

WEAVER, C. J., LADD and GAYNOR, JJ., concur.

STATE OF IOWA, Appellee, v. WILBUR JOHN, Appellant.

RAPE: Opportunity and Complaints as Corroboration. Opportunity
1 to commit rape, and complaints by prosecutrix that the accused
had committed such an act on her, will not constitute the required corroboration.

RAPE: Complaints Not Constituting Res Gestae. Complaints by
2 prosecutrix as to the alleged assault upon her, made at a time
after she had had time to premeditate and deliberate, and after
she had premeditated and deliberated, are not admissible.

RAPE: Physical Incapacity—Effect. Physical incapacity of de-
3 fendant to consummate or commit an act of sexual intercourse
is, while not a defense, relevant to the issue of intent.

Appeal from Mahaska District Court.—D. W. HAMILTON,
Judge.

FEBRUARY 17, 1920.

DEFENDANT was indicted on the charge of assault with intent to commit rape, tried, and convicted of simple assault. He appeals. Opinion states the facts.—*Reversed.*

L. T. Shangle and J. H. Whitecotton, for appellant.

Maxwell A. O'Brien, County Attorney, and *H. M. Havner*, Attorney General, for appellee.

GAYNOR, J.—The defendant is charged with assault with intent to commit rape. The crime is alleged to have been committed on or about the 14th day of March, 1918, in Mahaska County, Iowa. It is charged that the defendant unlawfully, willfully, and with force and violence, made an assault on one Mary Hattery, with intent then and there to have carnal knowledge of and sexual intercourse with her against her will. The indictment was returned on the 21st day of May, 1918.

Defendant entered a plea of not guilty. The cause was

tried to a jury. At the February, 1919, term of said court, a verdict was returned, finding the defendant guilty of simple assault. Judgment was entered upon the verdict. From this, defendant appeals, and assigns many errors for reversal:

First, that there was no corroborating evidence. In this, he relies on Section 5488 of the Code of 1897, which provides that, in a prosecution for assault with intent to commit rape, the defendant cannot be convicted on the testimony of the injured party, unless she be corroborated by other evidence tending to connect the defendant with the commission of the offense.

1. RAPE: opportunity and complaints as corroboration.

It is the contention of the defendant that the charge made was permitted to go to the jury upon uncorroborated testimony of the prosecuting witness, without other evidence tending to connect the defendant with the commission of the offense. At the conclusion of the evidence for the State, the defendant moved that the charge of assault with intent to commit rape be withdrawn from the consideration of the jury, for the want of evidence to support it, and in that there was no evidence in the record, outside of the evidence of the prosecuting witness, Mary Hattery, the injured party, tending to single out or point to the defendant as the one guilty of the crime. This being overruled, the defendant then moved that the court strike from the record all evidence as to what was said by the prosecuting witness, Mary Hattery, to her daughter and others, long after the time when it is claimed the assault was committed, as incompetent, immaterial, and self-serving. These motions were also overruled. This is the first complaint made.

The court, in its instructions to the jury, told them that a conviction cannot be had upon the testimony of the person assaulted, unless she be corroborated by other evidence

tending to connect the defendant with the commission of the offense, and that the corroboration must be found in other testimony than that given by the prosecuting witness; that there must be a showing of facts and circumstances other than shown by her testimony, which tended to connect the defendant with the assault charged against him, and then said that the complaints of the prosecutrix to others are not alone sufficient to constitute the corroboration required by law; that evidence of bruises on her body and evidence of torn clothing are not alone corroboration, for none of them may tend to connect the defendant with the commission of the offense charged; that opportunity is not enough in itself to constitute the corroboration required by law, and finally said there must be independent testimony in the case, outside of the evidence of the prosecutrix, which tends to identify and single out the defendant as the perpetrator of the crime charged, and which, considered in connection with the testimony of the prosecutrix, connects the defendant with the commission of the crime.

The record discloses that the defendant was a farmer and an unmarried man, and lived alone in a home upon his farm; that he engaged the prosecutrix to keep house for him; that he was to furnish a home for her and her daughter, and buy the girl what clothes she needed to go to school, but was not to pay wages; that she was to have the privilege of living in his home and storing whatever goods she had there; that she came to defendant's home about the 1st of March, and brought considerable personal property with her; that she stayed there about 13 days; that, after her coming, she did the housework, prepared the meals, etc. The prosecuting witness is about 52 years of age, and the defendant, about 47.

The State's testimony, as set out in the abstract, is substantially as follows: The prosecuting witness testified:

"Beulah, my daughter, is 14 years of age. We went to

defendant's about the 1st of March. No one lived there but the defendant. After we had been there a week or so, defendant showed us some pictures of former housekeepers and said: 'One of them used to take me down and sit on me. Another one sat on my lap. Another took a bath by the stove, while I sat by the stove, reading a paper.' I was shocked, and said, 'I believe you had only chippy women here.' About a week after this, he came home in the afternoon, from helping the neighbors take hogs to Lacey. My daughter was at school. When he came home, he said something, and grabbed me. Later in the afternoon, I asked him whether he had his dinner. I was getting a meal for him. He came home in the middle of the afternoon. He took me down on the floor. Grabbed my wrapper off. I tried to get away. He tore my wrapper all off,—tore the buttonholes off. I tried to get away. He tore my shirt off. I tried to keep my clothes down. I had on an undershirt that was fastened in the back. My wrapper was buttoned down the front. He tore my shirt down the back, and tore it clear off of me. He could not get my other clothes off. The upper part of my body was naked. I told him my girl would come home pretty soon. He let me go, and said something; said that if I didn't give in, my daughter would. He said he would get it some way. He said that when he took me down. He didn't keep me down long. After he let me go, I ran upstairs and went to my room,—put a chair against the door. When he went out, I went downstairs. I found my shirt on the stove, put on my clothes, and then the girl came home."

She was then asked this question:

"Did you tell the girl anything about what had happened? A. No, not until she wanted to know what was the matter. Q. At the time she came home from school, did you tell her what had happened? A. After she asked me. Defendant came while I was getting supper. He came

in for supper. Q. At the time when the girl first came, did you explain to her what happened? A. I did not. Q. Did you get supper that night? A. Yes, sir. Later, I was going to take a bath. Had a tub and two chairs ready. Was heating water on the stove. He was reading. He was in the dining room; I in the kitchen. He grabbed the water and threw it out. Said I had to obey orders. The girl was there with me. He nearly knocked me down when he threw the tub of water out. Said I must obey orders. We went upstairs, and got ready to go to town. I started to take my wrapper off. My girl noticed my shirt, and wanted to know what was the matter with my shirt. I told her I had burned it. She wanted me to tell her more, but I didn't. Told her no more until we got to Lacey. Before we started for Lacey, he was in bed downstairs. We went to one Martin's. Mr. Hull came over there, and I told them what had taken place. They took us to Lacey. They took us to Moffit's, at Lacey. We stayed there all night. I had a blue mark on my arm. I went back to the defendant's afterwards and got my things. I saw him then, and he swore at me. Said I was a darn liar and a thief. I think Lacey is about a mile from the defendant's place."

On cross-examination, she testified:

"When he let me up, I went upstairs, and he went outdoors and went to sawing wood. When I got dressed, my daughter came. I got supper and set the table. I cooked the supper. I sat down to the supper. Defendant sat down and ate supper. I don't remember whether I ate or not. We had supper about six o'clock. Defendant sawed wood until supper time. I don't know whether he did his chores after supper or not. After supper, I changed my dress to go away. When defendant had me down, I did not scream. I was so weak, and nobody there. I didn't show anybody my bruises down at Martin's. Didn't show my daughter the bruises on my arm until we got to Moffit's."

Charles Martin, to whose house the prosecuting witness first went on the evening of the day when it is claimed the assault was committed, testified:

"She came to my house about the 14th of March. After she had been there a time, she told me, to some extent, what had happened. She didn't tell me at first. I don't remember what she said. She said something about 'this tear-up.' I don't remember what she said. Something about having had a tear-up."

On cross-examination, he said:

"I don't remember what she said. She said something about having had a tear-up. That is as near as I can remember."

The daughter, when on the stand, testified substantially the same as the mother, as to the showing of the pictures, and touching the servant girls he had before, and their conduct, and further said that, when she came home from school, her mother acted scared; that, when she asked her what was the matter, she didn't say anything. She further testified:

"I was by mother at the time he pushed her over [referring to the time when water was being prepared for a bath], and we went upstairs and changed our clothes. We were going to go. She had on a wrapper. It was torn. The buttonholes were torn. She took it off. Her shirt was torn and burned across the back. We were getting ready to leave. We went to a neighbor's. They didn't want to keep us, and took us to Lacey, and we stayed at Moffit's. I noticed blue marks, two scratches, on mother's arm. She said Wilbur [meaning the defendant] had done it."

Hall, the man who came to the Martin's home while the prosecuting witness was there, testified:

"It was about 8:30,—might have been a little later. I came over. Mrs. Hattery and her daughter were at Martin's. The prosecuting witness told me what she had been

through. We arranged to take them to town. Went back to defendant's with Mrs. Hattery and her daughter, and got some furniture and wearing apparel. This was four or five days after she had gone away."

This is all the testimony on the part of the State.

Now, it is apparent that defendant was in his own home; that the prosecuting witness was there by his permission, a servant working in his home. He had opportunity to do the thing charged to have been done by him. He was there, she was there, and they were alone. There is not one scintilla of evidence tending to connect the defendant with the commission of the crime charged, except that which comes from the mouth of the prosecuting witness herself. This is not sufficient, under the law, to make corroboration. The law requiring corroboration was enacted for the purpose of protecting those who might be wrongfully accused without satisfactory evidence of guilt. This statute has a purpose, and it is made in recognition of the fact that people may be falsely accused of this crime, and that charges of this kind are easily made and hard to disprove, and, when made, provoke hostility in the minds of the general public against the party charged. So the law has wisely said that mere opportunity is not sufficient corroboration; that, while the fact that a crime has been committed may be shown by the testimony of the prosecuting witness, other evidence than that which comes from her must be found, tending to connect the party charged with the commission of the crime, before he can be convicted. It is one thing to find that a crime has been committed, and it is quite another thing to say that the party charged committed the crime. When it is sought to attach the guilt of the crime to any individual, the testimony of the prosecuting witness is not sufficient for that purpose. There must be other independent testimony, tending in some way to connect him with the commission of the crime. This

rule has its purpose,—a righteous purpose,—and should not be disregarded, even though, in a particular case, its application may allow a guilty party to escape. As said in *State v. Egbert*, 125 Iowa 443:

“The complaints of the prosecutrix, soon after the commission of the crime, and the condition of her body and clothing, may constitute corroboration of her testimony that a crime has been committed (that is, that someone has committed the crime charged upon her), but they cannot possibly constitute the corroborating evidence required by the statutory provision above referred to. Certainly, the declarations of prosecutrix identifying the defendant as the person who committed the crime can have no greater weight than the testimony of prosecutrix under oath to the same effect.”

It is not up to us to say that the testimony of this prosecutrix as to what occurred is most improbable. It is not for us to pass upon the credibility of her testimony. It presents a picture quite out of harmony, however, with the common experience and the observation of men. It is enough for us to say that there was a total absence of corroborating evidence tending to connect the defendant with the commission of the crime. Independent of the statements made by the prosecuting witness and her testimony, there is nothing. She cannot corroborate herself. If she could, the statutory provision would be no protection to one wrongfully accused. The court should have sustained defendant's motion.

We are further of the opinion that the testimony of the prosecutrix, given after she reached Martin's, was wholly incompetent. There was no spontaneity about it. She had time to deliberate and consider the thing best for her to say, and most effectual for her purposes. It certainly was not a part of the *res gestae*. The statements were made

2. **RAPED:** complaints not constituting *res gestae*.

at such a time and under such circumstances that they do not appear to be the result of excitement, produced by an assault upon her. The general rule is that the declarations of the prosecutrix are admissible only when made soon after the transaction to which they relate, and under such circumstances as indicate that they are spontaneous and unpremeditated. Time is not always a bar to the admission of this testimony; but when it is made to appear that an opportunity for complaint was given, and she made none, and there was nothing to prevent her doing so, the question presents a different aspect. It is not then the cry of distress. It is not then the indignant protest of a virtuous gentlewoman, deeply wronged,—not the wrong itself, crying for redress. When it appears that time for meditation has preceded the declaration, and the declaration bears upon its face the evidence of premeditation, deliberation, and well-weighed speech, it does not savor of that character of complaint which the law admits in cases of this kind. On this point, see *State v. Novak*, 151 Iowa 536.

It will be noted that it is alleged that the crime was committed on the 14th day of March, 1918. On the trial of the case, the defendant called to the defense certain medical gentlemen, Drs. Rogers, Clark, and Barnes.

3. RAPE: physical
incapacity:
effect.

These gentlemen were all skilled in their profession, duly licensed physicians, and admitted to be competent to give expert testimony. Dr. Clark testified that he knew the defendant; that, some time during the month of March, 1918, in connection with Drs. Barnes and Rogers, he made a physical examination of the defendant. The examination was for the purpose of determining whether it was physically possible for him to consummate the act which it was charged in the indictment he intended to commit. He was then asked what was the result of the examination. Objection was interposed and sustained. Defendant's counsel thereupon

stated that the witnesses would testify, and he offered to show by their testimony, that, in the month of March, 1918, within a very short time after it is alleged the offense charged was committed, this doctor, in connection with the other physicians, Clark and Barnes, examined the defendant for the purpose of determining whether it was possible for him to perform the act of sexual intercourse, and that, as the result of the examination, they found that it was impossible for him to perform the act of sexual intercourse; that this was the condition at the time it is alleged the offense was committed, and for more than two years prior to the examination; that the examination was thorough, and made according to all tests used for that purpose. This offer was also objected to, and the objection sustained. These other doctors were called, the same questions propounded, and the same offer made, and refused. This further question was asked:

"From what you learned of the condition of the defendant on the examination, and from his then physical condition, what is your opinion as to whether or not the defendant was capable of performing the sexual act?" (Objected to and sustained.)

The doctors were further asked:

"Could you determine, from the examination you made what was the cause of his then condition?" (Objected to and sustained.) Further question: "I will ask you, if a person receive a severe stroke of paralysis in the year 1914, state whether or not the condition which you found there would be the result of such stroke?"

The defendant further offered to show—and his offer was denied—that, in the month of March, 1914, he suffered from a stroke of paralysis, that wholly incapacitated him on one side, and finally on both sides; that he was unable to swallow, and had to be carried to his home; and that he never fully recovered from that condition. The fact of the

stroke and the consequences that followed the stroke, the defendant offered to show through the mouths of four witnesses; but, in each instance, the court denied him the right to make the showing. We think this was error, and very prejudicial to the rights of the defendant. In *State v. Bartlett*, 127 Iowa 689, this court said:

"As a witness in his own behalf, the defendant testified that, for nearly a year before the alleged assault, he had been unable, by reason of impotency, to engage in the sexual relation. It is now complained of that the court did not in any way refer to such subject-matter in the instructions to the jury. No request was made for an instruction; but, aside from this, we think none was required to be given. While impotency may be a sufficient defense to an indictment for the consummated offense of rape, it will not excuse an assault with intent" to commit rape.

This is relied upon by the State to justify the court's action. Now, it is true that an assault with intent to commit rape may be made by one who is wholly physically incompetent to consummate the act. The fact of incompetency is no defense, but the fact is material and proper to be shown on the question of intent. The burden is on the State, not only to prove the assault, but that it was made with the intent charged; and, if it were made to appear, as the defendant offered to make it appear, that he was wholly incapable of consummating the act, this would have probative force upon the question of the intent in the mind of the defendant in making the assault, if that assault were made. We may illustrate the matter in this way: The defendant, in anger, points a gun at another, and pulls the trigger, knowing that the gun is loaded, and capable of inflicting severe injuries upon the person thus assaulted, if discharged. But the gun, from some cause or other, is not discharged. The intent to inflict injury may be found in the act shown to have been done. Or, if he does not know

that it is loaded, but believes it is, and does the act in the same way, the intent to inflict injury may be gathered from the act. But if he points a gun at another, knowing that it is not loaded, and knowing that injury cannot be inflicted by its use, it cannot be said that he intended to inflict that injury which he knew could not result from the act which he did. The court instructed the jury upon this point as follows:

"The law warrants the presumption or inference that a person intends the results or consequences following an act which he intentionally commits, which do follow such act, if the proof establishes such facts."

A jury might well find, with such evidence before it, that the one charged did not intend to consummate the act which he knew, at the time, he was wholly incapable of consummating. Though the fact, if proven, would not, in itself, be a defense, it was a fact, when proven, that bore strongly upon the intent of the defendant in making the assault charged, and was, therefore, competent evidence to be considered by the jury, when it came to determine the intent with which the assault was made. Moreover, the court permitted the State, on cross-examination of these doctors, after excluding the offer aforesaid, to propound and have answered the following questions:

"Q. You say this man was below normal at the time you examined him? A. We considered him mentally below normal. Q. A man could be below normal, and yet have sexual desire? A. Yes, sir."

The defendant thereupon asked the question: "Could a man in his condition have that desire?" This was objected to as incompetent, irrelevant, and immaterial, and the objection was sustained.

There are other errors assigned; but they will not arise on another trial, if another trial is to be had, and we

do not, therefore, at this time feel called upon to consider them.

For the errors pointed out, the case is—*Reversed*.

WEAVER, C. J., LADD and STEVENS, JJ., concur.

J. LYONS, Appellee, v. FARM PROPERTY MUTUAL INSURANCE
ASSOCIATION OF IOWA, Appellant.

INSURANCE: Reformation of Application. The copy of the appli-
1 cation actually attached to the policy may not be *reformed* in
an action on the policy. (Sec. 1741, Code, 1897.)

INSURANCE: Proofs of Loss—Invalid Requirement. Provisions of
2 a policy which require proofs of loss in addition to those re-
quired by statute are invalid. (Sec. 1742-a, Code Supp., 1913.)

PRINCIPAL AND AGENT: Proof of Agency. Agency may be
3 proven by the testimony of the agent.

EVIDENCE: Opinion Evidence—Death from Lightning. One fami-
4 liar with the condition and appearance of the hide of an animal
killed by lightning may testify, on stated facts, whether the
animal was so killed.

INSURANCE: Death from Lightning—Evidence. Evidence of the
5 actions of animals and of the symptoms developed is admissi-
ble on the issue whether the animals were killed by lightning.
Evidence held to present a jury question.

Appeal from Guthrie District Court.—GEORGE B. LYNCH,
Judge.

FEBRUARY 18, 1920.

ACTION on a certificate of insurance resulted in judg-
ment against the defendant, from which it appeals.—*Af-
firmed*.

George Wambach and Sayles & Taylor, for appellant.

Carl P. Knor, for appellee.

LADD, J.—The defendant is a mutual insurance association, organized under Chapter 5 of Title IX of the Code. A certificate of membership was issued to plaintiff, insuring his horses, mules, and colts against loss from lightning and other casualties, to the amount of \$600, and his cattle against loss by lightning and other casualties to the amount of \$500, for five years, beginning December 19, 1917. The plaintiff claims that a horse of the value of \$100 and a cow of like value were struck by lightning about August 6, 1918, and, as defendant refused payment, he brought this action to recover the value of said animals, less \$16.10, payable to defendant as his annual assessment. The defendant pleaded that, in the application for insurance, the amount recoverable on each animal was not inserted,—that is, the application limited the insurance to \$100 per head on horses and \$75 per head on cattle; but neither “the \$100 on horses” nor “the \$75 on cattle” was inserted in the blank space left therefor in copying the application on the certificate.

I. The defendant alleged that this omission was through the mistake or inadvertence of one of its clerks, and prayed that the application might be reformed, so as to show the said amounts. The association was required, under Section 1741 of the Code, to attach “a true copy” of the application, and its omission so to do precluded it from pleading or proving the application or any part thereof, as a basis for any defense it might interpose. With the important limitations of the amounts of indemnity entirely omitted, it seems needless to say that the copy of the application attached to the certificate was not a true copy. This being so, the consequence of such failure to attach a true copy, clearly defined in the statute, may not be defeated by reformation. Whether the correction might be made, so as to prove effective as to subsequent clauses, there is no occasion for determining. It is enough to say now that,

1. INSURANCE: reformation of application.

under the statute, the defendant was "precluded from pleading, alleging, or proving any such application or representations, or any part thereof, or falsity thereof, or any parts thereof, in any action upon such policy." There was no error in sustaining the motion to strike this portion of the answer.

II. The motion to strike also asked that there be stricken that portion of Section 12 of its by-laws providing that, "where the carcass of said animal claimed to be killed by lightning shall be disposed of before the
2. INSURANCE: adjuster can view it, the owner shall have
proofs of loss: it examined by two disinterested parties for
invalid require- marks of lightning, both without and under
ment. the skin, and report their sworn statements to the association," and alleged that plaintiff had not complied therewith. Section 1742 of the Code, relating to loss of a building, was amended by adding thereto Section 1742-a of the Code Supplement, 1913:

"In furnishing proofs of loss under any contract of insurance for damages or loss of personal property it shall only be necessary for the assured, within 60 days from the time the loss occurs, to give notice in writing to the company issuing such contract of insurance accompanied by an affidavit, stating the facts as to how the loss occurred, so far as same are within his knowledge, and the extent of the loss, any agreement or contract to the contrary notwithstanding."

Plainly enough, this precludes any requirement of proofs of loss other than those specified. Appellant argues, however, that this conclusion is obviated by Section 1743 of the Code Supplement. That relates to "any condition or stipulation in an application, policy or contract of insurance, making the policy void before the loss occurs," or suspending it during default, and some other matters,

including the invalidity of specified agreements. Contained therein is a provision that:

"Nothing herein shall be construed to change the limitations or restrictions respecting the pleading or proving of any defense by any insurance company to which it is subject by law."

The section previously quoted is a part of the law, and, of course, in that event, the defendant might not set up, by way of defense, that the proofs of loss exacted by the contract, in addition to those provided by statute, constituted a defense. Moreover, Section 1744 of the Code Supplement, in fixing the time in which proofs of loss shall be furnished and suit begun, contains this clause:

"No provisions of any policy or contract to the contrary shall affect the provisions of this and the three preceding sections."

In restricting the proofs of loss which might be exacted, the legislature evidently designed to avoid the defeat of insurance contracts by defining the proofs which may be required. *Kinney v. Farmers' Mut. F. & Ins. Soc.*, 159 Iowa 490. We are of opinion that the portion of the by-law quoted was invalid, and that the failure of the plaintiff to furnish the proof therein specified did not constitute a defense. There was no error in striking this portion of the answer. Doubtless, the questions here considered should have been raised by demurrer; but, if so, the motion may be treated as such. There was no error in sustaining the motion.

III. Several rulings on the admissibility of evidence are complained of. Stemm was asked whether he was agent of defendant at the time the certificate of membership was issued. An objection as incompetent, in that the agency might not be proved by the declarations of the agent, was rightly overruled. He was competent as a witness, and

proof of any declarations made by him was not offered. The rule that agency may not be proven by the alleged agent's declarations does not preclude the establishment of such agency by the agent's testimony. *O'Leary Bros. v. German-American Ins. Co.*, 100 Iowa 390; *Schlitz Brewing Co. v. Barlow*, 107 Iowa 252; *Brown v. Rockwell City Canning Co.*, 132 Iowa 631. This disposes of other rulings dependent upon a prima-facie showing of the agency of Stemm.

IV. Rose testified that he had been engaged in the business of butcher 12 years, and had occasionally bought hides of horses and cattle struck by lightning, and, with reference thereto, testified that the effect on the hide was the same as any other burn; that it "hardens the hide and curls the hair, as a rule;" and that the hide would break after being salted; that he had examined the hide of the cow in question, which he had purchased of plaintiff in August, and found a burned spot about 4 inches in front of the left hip, and running to the flank. He was then asked:

4. EVIDENCE:
opinion evi-
dence: death
from lightning.

"Q. This spot that you observed on the hide,—was that caused by lightning, in your opinion?"

This was objected to, for that the witness had not shown himself qualified to express an opinion, and the objection was overruled. He answered in the affirmative. The testimony recited, if true, qualified the witness to answer; for he had stated that he had examined hides injured by lightning. The objection to his competency was rightly overruled. He testified, on cross-examination, however, that he didn't know personally that the hides he had examined were of animals killed by lightning; but there was no motion to strike his former answer, and, of course, what he testified to on cross-examination did not obviate the correctness of the previous ruling when made.

V. Defendant challenges the sufficiency of the evidence to carry the issues to the jury, and now insists that its mo-

tion to direct the verdict should have been sustained. Plaintiff testified, in substance, that the cow

5. INSURANCE:
death from
lightning:
evidence.

and horse appeared to be in good condition, the night previous; that he slept on the porch until 12 o'clock, when he noticed a cloud coming up, and, waking up, noticed that "it kind of commenced blowing, and I heard the thunder, and I looked to the northwest and saw a cloud coming up, and I watched it, and it commenced thundering and lightening, and I went into the house, and immediately after, a clap of thunder and lightning came, and a little rain cloud came up, and thunder and lightning;" that, in the morning, when he went out, "the cow did not move, appeared to be kind of crazy, and we let her in, and she stood up there a while, and did not go anywhere, and the other cattle went off, and I got to looking around, and found the mare, and she was standing there, and the other horses had gone away in the pasture;" that he left them there until noon, and he then took them to water, and "the cow would not drink, could not walk, and wiggled around down; and the mare did not know enough to drink. I put her head down in the tank, and she drank, and I put the mare in the barn, and left the cow out." The cow died, the following day. He further testifies that he removed the hide, and it "was kind of like it was burned;" that this was along the neck, 5 or 6 inches long, and looked "kind of red;" that, "before I skinned her, you could not notice nothing." He testified further that the horse died the 5th or 7th of September following; that he removed the hide; and that the burn on the hide was "along the neck from the jugular vein down to the point of the shoulder,—looked about the same as the cow." On cross-examination, the witness said that the animals "stood there in a kind of a stupor. * * * When they walked, they would kind of wiggle around. * * * Q. And they were feeble? A. Appeared to be. Q. Did they drag their legs

when they moved? A. Why, just kind of loose all over." Stemm, the defendant's agent, testified to having notified the company of the loss on October 12th, and to having seen the horse; that he noticed "a stream of hair that would not lay down smooth, from its head down to about its shoulder. The hair would not lay down like the rest. It was kind of long streak, possibly an inch or so wide at the head, and came rather to a point about the shoulder." He further testified that he did not observe "anything irregular in her movement." Rose testified that he had examined the cow's hide in the presence of several persons; "found one burned spot. It started in at about 4 inches in front of the left hip bone, and ran to the flank." He said, as heretofore stated, that, in his opinion, it was caused by lightning. On cross-examination, he swore that he did not think "it could be produced any way, only by a burn;" that "the spot was about 6 inches at the top, and ran to a point about 15 inches long; and that the hide at that location was hard." In *Freeman v. Farmers' Mut. F. & L. Ins. Co.*, 121 Mo. App. 532 (97 S. W. 225), the court ruled that evidence of the actions of animals and symptoms developed was admissible, as bearing on the issue of whether they were killed by lightning. In *Cottrell v. Munterville Mut. F. & L. Ins. Assn.*, 145 Iowa 651, a brood mare was covered by insurance against lightning, and was found dead in a pasture. The evidence was conflicting as to whether there was a dark streak in the flesh, extending from the ear along the neck, and down the shoulder to the knee, and whether there was any lightning in the vicinity on the night of her death, and the decision was that, "as the existence of the streak indicated death by lightning, the verdict could not be disturbed as not being sustained by the evidence." See, also, *Carpenter v. Security Fire Ins. Co.*, 183 Iowa 1226. Here, the jury might have found that the animals were alive and in good condition the night previous; that there was an electric

storm; and that they bore marks the next morning, and were in such condition as that they did not accompany the other stock to the pasture; and we are of opinion that, notwithstanding the possibility of death from some other cause, as suggested in the testimony of a veterinarian, whether they died from a stroke of lightning was rightly left to the jury for decision.

VI. Appellant also complains of the striking of a portion of the answer alleging that plaintiff failed to give the animals medicine, and was careless in their treatment, and that their death was due to his negligence, rather than to injury by lightning. We find no such order in the record. Nor was any evidence adduced, save that no medicine was administered, tending to support these allegations.

Exceptions were taken to four of the instructions. The fifth instruction is in accord with the rulings of this court, with respect to the weight to be given expert testimony in response to hypothetical questions. The objection to the sixth instruction urged, that the evidence was not sufficient to warrant the submission of the issue as to whether the animals were struck by lightning, has been disposed of. The objection to the seventh instruction seems to be that, in enumerating the matters, the jury might consider that the court did not exclude all others. As the jury was sworn to decide the cause on the evidence adduced, such a caution was not essential. Exceptions to the eighth instruction have been disposed of. We discover no error, and the judgment is—*Affirmed*.

WEAVER, C. J., GAYNOR and STEVENS, JJ., concur.

J. W. MILLER et al., Appellants, v. CITY OF GLENWOOD et al.,
Appellees.

L. W. LAMBERT, Appellant, v. CITY OF GLENWOOD et al.,
Appellees.

MUNICIPAL CORPORATIONS: Limitation on Debt—"Value of
1 Taxable Property." The constitutional limitation on the right
of a city to become indebted is 5 per cent on the actual value
of all the property, both real and personal, returned by the as-
sessor for taxation purposes, and not 5 per cent on the one-
fourth part of such value on which the levies are computed.
(Sec. 3, Art. 11, Iowa Const.)

MUNICIPAL CORPORATIONS: Special Charter Cities—Limitation
2 on Debt. The only limitation on the right of a special charter
city to become indebted is the 5 per cent limitation provided
in Sec. 3 of Art. 11 of the Constitution.

MUNICIPAL CORPORATIONS: Limitation on Debt—Cash on
3 Hand. Outstanding bonds and warrants should be reduced by
the amount of available cash on hand, in determining the debt
of a city as a basis for applying the constitutional or statutory
limitations on indebtedness.

MUNICIPAL CORPORATIONS: Public Improvements—Assessment
4 Proceedings. Proceedings of a special charter city *in re* pave-
ment of streets reviewed, and held conformable to statutes, Secs.
965, 971, Code Supp., 1913.

MUNICIPAL CORPORATIONS: Public Improvements—Notice
5 Publication in Special Charter City. Publication of notice of
proposal to establish a paving improvement in a special char-
ter city need be published for the required time in but *one*
newspaper. Sec. 823, Code Supp., 1913, requiring publication in
two newspapers, pertains only to non-special-charter cities.

MUNICIPAL CORPORATIONS: Public Improvements—Contract
6 Price Exceeding Estimate. The aggregate contract price for
paving may, in the absence of fraud, exceed the engineer's pre-
liminary estimate of cost.

Appeal from Mills District Court.—SHELBY CULLISON,
Judge.

FEBRUARY 18, 1920.

ACTION to enjoin the city from carrying out a contract for street paving, on the ground that the city had no jurisdiction, and that, by its act, an indebtedness was created in excess of the statutory limitation. The district court dismissed plaintiffs' petition. Plaintiffs appeal.—*Affirmed.*

W. S. Lewis and J. J. Hess, for appellants.

**Genung & Genung, C. E. Herring, and Otha S. Thomas*, for appellees.

GAYNOR, J.—These cases were consolidated and tried together, and are presented here on the same record. The actions are in equity, and are brought by property owners to enjoin the city council and the officers of the city, and the city itself, from proceeding under a contract for street paving; and the prayer is that the contract be declared null and void, and that the city and its officers be enjoined from attempting to assess the costs of proposed paving against the property of the plaintiffs, or any of them, or against the city. The cause was tried, and a decree rendered for the defendants, and plaintiffs' petition was dismissed. The plaintiffs in each case appeal.

The first contention is that, if the contract is permitted to stand, an indebtedness will be created, for which the city is liable, in excess of the constitutional limitation. This calls for first consideration.

It was stipulated on the trial that the total assessed value of all property within the corporate limits of the city of Glenwood is \$1,326,572; that in this is included moneys and credits of the assessed value of \$405,180, and

1. MUNICIPAL CORPORATIONS: limitation on debt: "value of taxable property."

all other property, of the assessed value of \$921,392. It was further stipulated that, on the 1st of July, 1917, when the contract was let, the city was indebted on bonds outstanding, to the amount of \$51,000, and on registered warrants, to the amount of \$4,336.01, making a total indebtedness at that time of \$55,336.01, against which it had on hand cash, to the amount of \$3,358.81, leaving a balance unprovided for of \$51,977.20; that, on the 3d day of January, 1918, at the time the work was accepted, there were outstanding bonds to the amount of \$55,000, and registered warrants to the amount of \$3,867.60, making a total outstanding indebtedness at that time of \$58,867.60, against which it had on hand cash to the amount of \$2,876.45, leaving a balance of outstanding indebtedness, unprovided for, of \$55,991.15.

It was further stipulated that, after assessing against abutting property its full share of the burden, there would still remain an indebtedness, for which the city would be liable, of \$6,185. Thus it appears that, on July 1, 1917, the total indebtedness of the city, after deducting the moneys on hand to meet said indebtedness, remained at \$51,977.20; that, if the contract is carried out, there will be an additional indebtedness created of \$6,185. Adding this to the outstanding indebtedness would make the total indebtedness of the city on that day, \$58,162.20. The total outstanding indebtedness of the city on January 3, 1918, was \$58,867.60. Deducting from this the amount of cash on hand to meet said indebtedness, there still remained an outstanding indebtedness of \$55,991.15. Adding the contemplated indebtedness to this would make the total indebtedness on January 3, 1918, \$62,176.15.

Article 11, Section 3, of the Constitution of Iowa provides:

"No county, or other political or municipal corporation shall be allowed to become indebted in any manner, for any purpose, to an amount in the aggregate, exceeding five per

centum on the *value of the taxable property* within such county or corporation, to be ascertained by the last state and county *tax lists*, previous to the incurring of such indebtedness."

Glenwood is a city acting under special charter, and the only constitutional limit upon its right to incur indebtedness is five per centum on the *value of the taxable property* within its limits. Assuming that the as-

2. MUNICIPAL COR-
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cial charter
cities: limita-
tion on debt.

essed value is the value of the taxable property within its limits, we find five per centum of the total assessed valuation to be \$66,328.60. So, on the assumption that the assessed value is the value of the taxable property, it cannot be said that the indebtedness, at either of the times hereinbefore referred to, exceeded the constitutional limitation. There is no showing of the value of the taxable property within the corporate limits of defendant city, except as found in this stipulation; and, we take it, this stipulation as to the total assessed valuation was based on the last state and county tax list made previous to the happening of the matters herein complained of; and we assume that the tax list shows the final total assessed valuation of the taxable property.

The city of Glenwood, as a city acting under special charter, is governed in matters such as here under consideration, by those provisions of the statute which relate to and control public improvements within cities under special charter. Turning to Chapter 14, Title V, of the Code of 1897, which has to do with cities under special charter, Section 933 of said chapter provides:

"The provisions of this chapter shall apply only to cities acting under special charter, and no provisions of this Code, nor laws hereafter enacted, relating to the powers, duties, liabilities or obligations of cities or towns, shall in any manner affect, or be construed to affect, cities while acting

under special charter, unless the same have special reference or are made applicable to such cities."

The only limitation, therefore, on the power of a city acting under special charter to create indebtedness is the constitutional limit of five per centum upon the *value* of all *taxable property* within its jurisdiction. Section 48 of the Code of 1897, Subdivision 10, provides that the word "property" includes personal and real property. It follows, therefore, that, when this constitutional provision says that a city cannot become indebted in any manner, for any purpose, to an amount in the aggregate exceeding five per centum of the value of the taxable property, it included in the words "taxable property" both real and personal property, subject to taxation within the city.

It will be noted that, in computing the city's indebtedness at the time the acts herein complained of were done, we deducted from the amount of outstanding bonds and

<p>3. MUNICIPAL CORPORATIONS: Limitation on debt: cash on hand.</p>	<p>warrants the cash on hand available to meet these obligations. As authority for so doing, we call attention to <i>Dively v. City of Cedar Falls</i>, 27 Iowa 227, in which it is said:</p>
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"Testimony was introduced to show the aggregate of the tax lists within the corporation for the years 1857 and 1858, that five per centum of either would fall below the amount of scrip issued. But, this conceded, the question actually arising is scarcely touched. There is no particle of testimony warranting the conclusion that, when the *scrip now in suit was issued*, the town was 'indebted in any manner' in another cent. Indeed, we do not know but that there was money in the treasury to pay this \$100, and more than this. If a municipal corporation has the money in its treasury to meet its indebtedness, the issue of warrants to the amount of \$20,000, or any other sum, however great, over five per cent of its taxable property, would not be a violation of the Constitution. In such a case, it would not

'become indebted,' within the meaning of the clause under consideration."

It is true that some of the things said in this case are said to be dictum, in *Windsor v. City of Des Moines*, 110 Iowa 175, 188, but the matter herein set out is not even criticized. This case was referred to and approved in *Phillips v. Reed*, 107 Iowa 331, in which we find this language:

"If it appeared that the indebtedness, to the payment of which the satisfaction of plaintiff's warrant is sought to be postponed, was incurred in excess of the prescribed limit, and in violation of the inhibition of Section 3 of Article 11 of the Constitution, the decision of this case will be a matter of no difficulty. It is true, the petition alleges that, at the times when this indebtedness was contracted, the city was in debt to the limit of the amount allowed. But it does not follow from this that the indebtedness as represented by these warrants was necessarily invalid. If the city had on hand or in prospect, at the time these warrants were issued, funds with which to meet them, without trenching upon the rights of creditors for current expenses of the city, then the warrants were valid, although such funds may have been thereafter wrongfully applied to other purposes."

The right to deduct moneys on hand from the total indebtedness appearing, was recognized also in *Rowley v. Clarke*, 162 Iowa 732.

It will be noted, and we think the words were used advisedly, that the constitutional limit of taxation is measured by the value of the taxable property within the city, and, by the same provisions, the value of the taxable property is ascertained by reference to the tax list. The tax list is presumed to show the final assessed value of all taxable property within the city. The limitation on indebtedness is five per centum of the *value* of the taxable property, and this *value* is determined by the last tax list, the tax list previous to the incurring of the indebtedness.

Some reference is made by appellants to the provisions of Section 1322-3a of the Supplement to the Code, 1913, made applicable by its terms to cities under special charter; but we see no relevancy in this reference to the matters here under consideration. The value of taxable property is one thing; the levy is quite another. The levy may be a uniform rate, fixed by statute; or it may be a rate fixed by a body authorized under the statute to fix a rate of levy. The levy is for the purpose of raising the necessary revenue to meet the obligations of the municipality. It often happens that the taxable property within the corporate limits is not *taxed* at its full value. In some instances, the statute provides that property shall be taxed at a certain per cent of its value, or of its assessed value. But the Constitution makes no such limitation upon indebtedness. The constitutional limitation is five per centum of the *value* of the taxable property, and not five per centum of the value fixed for taxing purposes.

In *Windsor v. City of Des Moines*, 110 Iowa 175, it was said (after reciting the provisions of the Constitution hereinbefore referred to):

"The assessed valuation of the taxable property within the corporate limits of the city of Des Moines, as shown by the state and county lists of the year 1896, was \$16,475,260. The authorized debt was, therefore, \$823,763."

So it will be seen that, in determining the limit of the indebtedness the city was authorized to incur, the computation was based on the actual value, as shown by the tax list of the preceding year. But further, and more to the point, is *Halsey & Co. v. City of Belle Plaine*, 128 Iowa 467, in which it is said:

"Precisely stated, the contention of the plaintiff is that, as taxes cannot be levied or exacted otherwise than on the basis of the taxable value,—that is, 25 per cent of actual value,—such taxable value must be accepted as the 'value of

the taxable property,' within the meaning of that expression as found in the Constitution. * * *. It is the contention of defendants, on the other hand, that the debt limit provision of the Constitution had relation only to the actual valuation of property as the same may be found and returned by the assessor, for taxation purposes. * * *

It thus becomes apparent that we have, as the sole question in the case: What basis of valuation, in view of the present statute, must be accepted from which computation of lawful indebtedness shall be made? * * *. Now, the time of the adoption of the Constitution, and, for that matter, continuing down to the appearance of the present Code, the law of making property assessments for the purpose of taxation recognized no other basis than that of full values. This was known to, and, we must assume, was in the minds of, the makers of the Constitution. And from this it is an easy step to the conclusion that, in accepting property valuations as a basis from which computation for limitation purposes was to be made, no more was intended than the meaning conveyed by the literal reading of the provision. If this view be sound, then an observance of such provision involves, first, an inspection of the tax list, to ascertain the amount of taxable property, in value, in the city; and, second, avoidance of debt beyond the limit of five per cent of such value. How, then, is the situation affected by the appearance of Code Section 1305 upon the statute books? The reason for the enactment of that section is not difficult of ascertainment. It is common knowledge that, prior thereto, the law on the subject of making assessments was persistently and universally violated, and the purpose and intent of the enactment in question was to secure, as nearly as possible, a compliance with the law requiring assessors to find and return properties at the full value thereof, and to the end that uniformity might obtain. The provision that taxes should be imposed only on the basis of twenty-

five per cent must be said to have been matter of inducement only. Certainly, it was not intended to change the duty of assessors in making assessments. With each of them, the duty is now, as before, to enter upon the assessment roll the full value of property, each within his respective district. The difference—and it is the only one—is that, when the tax levy comes to be spread upon the treasurer's book, a basis of twenty-five per cent of the assessed or actual value is required to be adopted for that purpose. Such a provision cannot, therefore, be said to change or give a new meaning to the expression as found in the Constitution, 'the value of the taxable property.' Moreover, the 'taxable value' could not, by any reasonable interpretation, be held to be synonymous with, or the equivalent of, 'the value of the taxable property.'"

See, also, *France v. City of Des Moines*, 183 Iowa 1311, in which this court recognized the actual value of the taxable property within the corporate limits as a basis for determining whether or not the indebtedness exceeded five per centum of the value of the taxable property.

So we say that, in no event, does it appear that, in contracting the indebtedness here under consideration, the city exceeded the constitutional limitations upon its rights.

It is next contended that there was no jurisdiction to proceed in the matter of paving; that certain things essential to the jurisdiction were not done.

Before proceeding to a consideration of what was actually done or omitted, we have to say that the authority of the city to act, and the manner of its acting, is controlled by those statutes which govern the action of cities under special charter. So we turn to Section 965 of Chapter 14 of Title V of the Code Supplement of 1913, which deals with cities under special charter, and we find this section reading:

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"Before the council orders any street improved or sewer constructed, it shall direct the engineer to prepare a plat, showing the location and general nature of the improvement, the extent thereof, the one or more kinds of material, * * * and an estimate of the cost thereof, and the amount assessable * * * upon each lot or parcel of land adjacent to or abutting on such improvement per front foot or square foot in area, and file such plat and estimate in the office of the clerk or recorder. Notice of its intention to make such improvement shall be published by the city clerk or recorder in three consecutive issues of a newspaper of such city, stating that such plat is on file, and, generally, the nature of the improvement, its location, one or more kinds of material to be used, and an estimate of its cost, fixing the time before which objections thereto can be filed, which time shall be not less than five days after the last publication of such notice. The council, after considering such objections, shall determine what changes, if any, shall be made in the plan shown by such plat, and may, by resolution, order such improvement, prescribing generally the extent of the work, the one or more kinds of material * * * when the work shall be completed, the terms of payment, and provide for the publication of notice asking proposals for doing such work, and the time the same will be acted upon."

Section 971, Code Supplement, 1913, provides:

"After filing the plat and schedule referred to in Section 821, Chapter 7, of this title, the council shall direct the clerk or recorder to give ten days' notice, by publishing same three times in a newspaper published in said city, that such plat and schedule are on file in the office of the clerk, fixing a time within which all objections thereto or to the prior proceedings must be made in writing; and the council, having heard the objections and made necessary correc-

tions, shall levy the special assessment as shown in such plat and schedule."

Before anything was done, the city passed a resolution, known in the record as Resolution 216, and called "a resolution of necessity." It recites that the welfare of the city required that certain alleys and streets in the city be paved, naming them, and describing the character of material to be used, etc., and then appoints and instructs, in said resolution, that Theodore S. DeLay, an engineer of the city, prepare a plat and schedule of the proposed improvement, showing the location and general nature of the improvement and the extent thereof, together with the estimated cost and the amount to be assessed against the various property owners abutting thereon, and to file such plat and estimate in the office of the clerk. This was all that the statute required, to initiate the work. The engineer, in pursuance of this resolution, prepared a plat, showing the location and general nature of the improvement, the extent thereof, the one or more kinds of material to be used, and an estimate of the cost thereof, and the amount assessable upon each lot or parcel of ground adjacent to or abutting on such improvement. This plat and estimate were duly filed in the office of the clerk. The plat so made by the engineer is not in this record. The schedule of assessment, however, is. The plat is said to be lost or mislaid, and, in its absence, we have the engineer's testimony to the effect that he prepared the plans and specifications substantially as directed; and we find that he did this. The schedule of assessment shows the description of the property subject to special assessment, the name of the owner, and the total estimated assessment. There is not shown to be any substantial departure from the requirements of the statute in relation to the preparation of the plat, the location and general nature of the improvement, the extent thereof, or the kind of material to be used. The estimate before us conforms to the statute. Upon the

filing of the plat and the approval of the same by the city, as conforming to the requirements of the law, the council passed a resolution, approving the plat and schedule of the engineer. After this, a resolution, known as No. 219 in the record, was passed, fixing the time for the hearing of

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city.

any objections to the passage of the proposed resolution, and to the construction of the improvement. The time was fixed at 8 o'clock P. M., on the 21st day of May, 1917, and the resolution directed the city recorder to give notice, by publication in a designated paper, of the pendency of the above resolution, and of the time at which the proposed resolution would be considered by the council, and objections heard to its passage. A notice was duly published in the Mills County Tribune, as directed. A copy of the resolution, known as No. 219, was attached to and published with the notice.

There seems to be no question as to the notice, but objection is made to the proof of service. Proof of the service is in these words:

"I, Earl A. Davis, being duly sworn, depose and say, that I am publisher of the Mills County Tribune, a newspaper published at Glenwood, in and for said Mills County, and that a notice, a copy of which is hereto attached, was published in said newspaper three consecutive issues, the last being on May 14, 1917."

Some contention is made that the service is insufficient, in that it was not published in three issues. We do not concern ourselves to answer this, because there is no proof, except the affidavit above set out, and this shows that it was, in fact, published in three consecutive issues.

But it is claimed that Section 823 of the Supplement to the Code, 1913, requires two publications in each of two newspapers published in the city. We had to deal with this contention in *Diver v. Keokuk Sav. Bank*, 126 Iowa 691.

and held that Section 823 does not apply to a city under special charter; that the duty of cities under special charter is governed by Section 971; that Section 971 was not repealed; that Section 823 relates to notice in cities acting under the general law. But, even if Section 823 did apply, it will be noticed that, in Section 823, the statute says, "if there be that number, otherwise in one." There is no evidence that there was more than one paper in this city. So, under either theory, there is nothing to plaintiffs' contention that the notice was not properly served.

It is next contended that the whole cost of the assessment exceeded the estimated cost, and that this was not allowable, under the law.

There is no evidence in this record showing that the actual cost of the improvement exceeds the estimate. It seems to be conceded in argument, however, that the actual contract price for paving in the aggregate amounted to a sum in excess of the estimated cost. The requirement of Section 965, to the effect that the engineer shall report to council an estimate of the cost of the improvement, is not intended to limit the cost absolutely to the estimate so made. It is a guide to the council in determining whether or not the improvement should be made. It is quite impossible, in estimating the cost of a public work of this kind, to determine in advance the actual cost the city will incur in its completion. The estimate often proves inadequate. It is only for the purpose of advising those who may be called upon to meet the expense, when incurred, of the probable cost, as a basis for concluding whether the probable cost will exceed the probable benefits to be conferred by the improvement. If cities were to be held to a strict rule in estimating costs, it would never be safe to enter upon any scheme of public improvement. After the estimate, and before the contract is let, there may

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price exceed-
ing estimate.

be such an increase in wages and cost of material that it would be utterly impossible to perform the work within the limits of the estimate. In the absence of fraud or collusion, or something of that sort, the fact that the completed work exceeds the amount of the estimate does not leave the city without jurisdiction to assess abutting property its proportionate share, measured by the rules governing the special assessment. It was not necessary that the engineer estimate each item that enters into the ultimate estimate of costs. In Page and Jones on Taxation, Volume 2, Section 819, we find this:

"By the specific provision of some statutes, a contract cannot be let for a price exceeding that specified in the estimate, and an assessment cannot be levied in excess thereof. * * * Under most statutes, however, there is no restriction of the amount of the final assessment to the amount of the preliminary estimate. Under such statutes, the estimate is advisory merely; and the assessment is valid, although the amount of the assessment exceeds the amount of the estimate, if the assessment is levied after the improvement is completed, and the actual cost thereof determined."

We do not find anything in the statute limiting the actual cost of the improvement to the preliminary estimate. In *Nash v. City of St. Paul*, 23 Minn. 132, it was said that the board of public works had no authority to contract that the work to be done be limited to such an estimate. The general rule is that, where there is no limitation in the statute,—no provision in the statute, that the contract price and the final assessment for benefits shall not exceed the preliminary estimate,—the preliminary estimate is not a limitation on the contract price. In *Auditor General v. Chase*, 132 Mich. 630 (94 N. W. 178), it was held that assessments may be made to cover the actual expense, though the amount exceeds such estimate. The same rule was sug-

gested by our own court in *Simpson v. Board of Supervisors*, 186 Iowa 1034; and in *Monaghan v. Vanatta*, 144 Iowa 119.

We do not find that there is anything in this contention of plaintiffs'.

Upon the whole record, we do not find the plaintiffs have made, a case entitling them to the relief prayed for. We think the court was right in dismissing their petition. Its action is, therefore,—*Affirmed*.

WEAVER, C. J., LADD and STEVENS, JJ., concur.

C. H. SAMPSON et al., Appellees, v. EARL JUMP, Appellant.

JUDGMENT: Finality of Adjudication. A defendant who, in an
1 action for the recovery of the purchase price of property, defensively pleads and unsuccessfully litigates the question of fraud in the contract, may not again present such issue as the basis for a counterclaim in a subsequent and independent action by the same plaintiff, even though, in the first action, the plaintiff was also unsuccessful on the ground that he was pursuing the wrong remedy.

JUDGMENT: Matter Litigated—Opinion of Court. In determining
2 in one action the exact matter litigated in a former equity action embracing several issues, the court may resort to the opinion of the lower court.

Appeal from Audubon District Court.—O. D. WHEELER,
Judge.

FEBRUARY 18, 1920.

ACTION to recover on notes. Defendant pleads counterclaim. Plaintiffs reply that matters set up in counterclaim have been adjudicated in a former action. Judgment for the plaintiffs for the amount of notes in suit. Defendant's counterclaim dismissed, as having been adjudicated in a

former action adversely to the defendant. Defendant appeals.—*Affirmed.*

White & Clarke and Graham & Graham, for appellant.
Mantz & White, for appellees.

GAYNOR, J.—Plaintiff brings this action to recover on two promissory notes. The defendant admits the execution of the notes, and that the amount alleged therein is due, but pleads, by way of counterclaim, that the plaintiffs are indebted to him in a sum far in excess of the notes, and, as a basis for such claim, says that, on or about the 14th day of October, 1911, the plaintiffs were the owners of certain land in Saskatchewan, Canada, and, for the purpose of inducing him to take the land and to enter into a contract to purchase it, falsely and fraudulently represented the character of the land, its condition, and other matters which went to affect the value of the land; that these representations and statements made touching the land were believed by the defendant, and by them he was induced to enter into a contract for its purchase, and to take possession of the same; that the representations were untrue; that plaintiffs knew they were untrue, and made them for the purpose of inducing the defendant to enter into the contract; that the character and condition of the land were not as represented; that the land was not adapted to agriculture and stockraising, as represented; that, after defendant had entered into the contract, he went into possession of the land and occupied the same during 1912, 1913, and 1914, and attempted to farm the same; that he spent a large amount of time and money and labor in attempting to farm the same, as contemplated by the contract, and did not discover that the representations were untrue until the latter part of 1914; that he then discovered them to be absolutely false, and thereupon notified the plaintiffs that he rescinded the contract, and refused to complete and carry it

1. JUDGMENT:
finality of
adjudication.

out; that the plaintiffs assented thereto, and resumed the possession and occupancy thereof. He now sues by way of counterclaim, to recover the expense incurred in moving his family to the land, the expense of returning from the land, the reasonable value of time spent in attempting to farm the land, the amount reasonably spent in attempting to improve the farm, in breaking up the land, etc., and for improvements put upon the land, taxes paid, etc.

To this counterclaim the plaintiffs filed a reply, saying that the matters and things set out in defendant's counterclaim have been adjudicated between the parties in a suit heretofore brought in the district court of Dallas County by these plaintiffs against the defendant; that, in said suit, the plaintiffs sought to recover a portion of the purchase price due upon said contract of sale, and this defendant filed an answer defensively based upon the same allegations of fraud set up in the counterclaim in this suit, and, in a cross-petition based on the same fraud pleaded in his counterclaim, asked affirmative relief, to wit, that the contract be canceled, set aside, and held for naught, because of such fraud, and further filed a counterclaim in which he sought to recover damages based upon the fraud now relied upon in the counterclaim in this suit. The counterclaim, however, was withdrawn before the case was finally submitted to the Dallas County court; but the fraud defensively alleged, and the fraud alleged upon which he predicated a right to have the contract canceled, set aside, and held for naught, remained in the case, and was in the case at the time it was passed upon by the Dallas County court. Upon a hearing in that court, plaintiffs' petition was dismissed upon its merits, and defendant's answer and cross-petition determined and dismissed upon their merits.

The decree relied upon by the plaintiffs as an adjudication of the matters set out by the defendant in his counterclaim in this suit is as follows:

"Now, on this 26th day of June, 1916, this cause having been heretofore submitted to the court upon the pleadings and the evidence, and taken under advisement to be determined and a decree entered herein in vacation, and the matter coming on for final determination and decree, and the court being fully advised in the premises, finds that the plaintiffs' petition should be dismissed on its merits, for the reason that they have mistaken their remedy, and that the defendant's answer should be dismissed on its merits, and that each of the parties hereto should pay the costs made by such party therefor. It is, therefore, considered and decreed by the court that the plaintiffs' petition be and the same is hereby dismissed, and it is further ordered that judgment be and the same is hereby rendered against the plaintiffs for the costs made by them, to wit, \$102.15, and that judgment be and the same is hereby rendered against the defendant for the costs made by him, to wit, \$129.75, and that execution issue against each of them therefor. To all of which each of the parties hereto at the time duly except."

The district court from which this appeal is taken held that this decree adjudicated the rights of the plaintiffs upon the counterclaim urged in this suit, and that the defendant is now estopped to set it up for re-adjudication, and so dismissed the counterclaim, and entered judgment for the plaintiffs upon the notes. From this action, defendant appeals.

The only question here is whether or not the matters herein relied on as a counterclaim were adjudicated adversely to this defendant in the Dallas County suit. If they were, that ends this controversy, so far as the defendant's right to maintain his counterclaim in this suit is concerned. This decree, upon its face, indicates that the facts on which defendant bases his counterclaim in this suit were determined on their merits adversely to defendant's claim made here. The claims here being substantially the same as there, an

adverse finding there would be an adjudication here, and would preclude the defendant from urging them again. But the question still is open for consideration. Did the court there, notwithstanding the recital in the decree, adjudicate the matters involved in the counterclaim in suit here? To determine this, we must go to the record made in the Dallas County suit. Turning to the pleadings in the Dallas County suit, we find that plaintiffs there, being the plaintiffs here, filed a petition substantially as follows:

"The plaintiffs, for cause of action, state that the plaintiffs are residents of Audubon County, Iowa, and that the defendant is a resident of Dallas County, Iowa; that, on or about the 14th day of October, 1911, the defendant purchased of the plaintiffs, on the crop payment plan, the west half of Section 30, Township 28, Range 3 West of the 35th M., Saskatchewan, Canada; that a copy of said contract of sale and purchase is hereto attached, marked Exhibit A, and the same is hereby made a part hereof; that, in accordance with said contract, marked Exhibit A, the defendant took up his residence on said above-described land in the spring of 1912; that the said defendant farmed said premises, and raised crops thereon during the years 1912, 1913, and 1914, and in accordance with the terms of said contract of sale, amounting to approximately \$1,800; that the defendant has paid plaintiffs but \$500 of said amount, plus the taxes, leaving a balance due of approximately \$1,300. Wherefore, plaintiffs asked judgment against the said defendant in the said sum of \$1,300 and the costs of this action, taxed at \$. Exhibit A, annexed to the petition, is a copy of the contract annexed to the answer and counterclaim in this case."

To which the defendant replied, by way of answer and cross-petition, to defeat recovery on the contract, that the contract relied upon was procured by fraud, and then set out the same fraud relied on in the counterclaim here, alleg-

ing further that, after discovering the fraud, he notified the plaintiffs that he rescinded the contract, and refused to complete and carry it out, on account of the fraud; and that the plaintiffs had acquiesced therein, and had repossessed themselves of the land. The case stood before the court, then, upon the issues thus pleaded, and the matter was fully tried, and evidence was introduced to support defendant's contention that the contract was procured by fraud. The court found affirmatively that there was no fraud shown by the defendant which justified a rescission of the contract; that the plaintiffs had perpetrated no fraud upon the defendant which defeated their right to recover the consideration provided for in the contract, and so dismissed his answer and cross-petition upon its merits. True, it dismissed plaintiffs' petition, also, upon its merits, but not on the ground that the defendant had established the fraud alleged; but held that, inasmuch as the defendant had attempted to rescind the contract, whether rightful or wrongful, and the plaintiffs had accepted the rescission and taken possession of the land, they were not in a position to recover any part of the consideration provided for in the contract; that "they could not eat their cake and keep it."

The prayer of plaintiffs' cross-petition in the Dallas County suit was that the petition be dismissed, and the contract be decreed to be fraudulent and void, and that it be canceled and set aside. This defense, the court dismissed upon its merits. In the decision of the case, the court said:

"Plaintiffs on the trial of this case introduced many letters from the defendant while he was residing on the land in controversy. The statements and representations contained in these letters are not calculated to impress one with the full confidence he might otherwise have in defendant's testimony, as given on the trial, as to alleged fraudulent statements and representations to induce the defendant to execute the contract. There is no question

but that the defendant sought this deal, and he said on the trial that he had just been in Canada, and felt sure that was the place for him to get a start. Mr. Sampson had never seen the land, at the time the contract was entered into. Whatever was said about these lands was said to Mr. White. Yet it is claimed that Sampson said the soil was like the soil of Viola Township, Audubon County. Under the circumstances, as shown, there can be but little question as to what Sampson did say in this respect. He had been in Canada, but had not seen this land. He no doubt said the conditions in Canada reminded him of the conditions in Viola Township when he first settled there. The court could not find that this was a false or untrue statement. Defendant was, no doubt, disappointed in the improvements he found on the place; but the contract provides for a reduction on the price of the land of \$160 on account of the conditions of the improvements, and further provides, in substance, that the defendant should be allowed to use \$250 from the funds that would otherwise go to the plaintiffs, to add to the house, etc. The conditions of the land were soon discovered, after defendant took possession, in 1912. All of these matters, if different from the representations of plaintiffs, came to defendant's knowledge within a few months after he moved on the premises. The only thing, then, that he may not have known, if not as represented, was as to the adaptability of the land to agricultural purposes. * * * There can be but little question that, if any misstatements were made by plaintiffs, that in any manner induced defendant to enter into the contract, the falsity was soon discovered by defendant. The law requires that he should act within a reasonable time. * * * While I do not find, as a matter of fact, that the charges of fraud have been sustained by the evidence,—in fact, judging from defendant's letters, the court would not be justified in so finding,—yet, if said charges were established by

a preponderance of the evidence, under the law as announced in cases to which I have referred, defendant, by his conduct, is held to have elected to carry out the contract."

Thereupon, the court set out the letters from the defendant which had been introduced in evidence, bearing upon this question. The court further said:

"In all this correspondence, to this date, the only complaint made as to false representations is the following: 'I have borrowed considerable money of you. The bulk of it has been used right here, to improve your place, as it was not fit for man or beast when I arrived here; and, in fact, had I seen it before I bought it, I would have passed it by. Now everything is in good condition as to fences, buildings, and land. I borrowed something over \$500 from you, to break out land that was sold to me as ready for the drill; but we will say nothing more about that.'"

The court further said:

"Mr. Jump seeks relief from his contract, but nowhere claims in these letters that he was defrauded in the purchase of the land; says he cannot stand the opposition in the home any longer, etc., and further says: 'I have no complaint of productiveness. I am not going to Iowa to score Canada. I expect to remain mute as to why I am compelled to quit. Wickhams know all about the trouble. My wife has told them long ago; and later, I wrote a letter to keep very quiet. I will get you a good renter for the place Times will pick up. Prices are good this year. We seem to be in a favorable locality. We have very much to be thankful for. Other parts of Canada are a complete failure, this year. In fact, there has never been a failure in here, according to old-timers. I think it is a great place for stockraising of all kinds. I just got fixed so I could accomplish my desired end, and now it is all at an end.'"

The court said:

"One cannot read these letters without knowing why. In some respects, these letters are stronger against defendant's present contention than were the letters in *Handley v. Handley*, 115 Iowa 151, against the plaintiff. These were written when there was no lawsuit or controversy between the parties, and when there was nothing to induce an untrue statement. I reach the conclusion that proofs fail to establish the alleged fraud, and further that, if such fraud is shown by a preponderance of the evidence, that defendant failed to act with promptness, and that, by his conduct, he elected to carry out the contract."

The court further said:

"The defendant's contention is that there was fraud in the contract, on account of which he had a right to rescind the same. If he was sustained in this contention, there would be no liability on his part for any part of the purchase price, or for damages, nor could specific performance be enforced against him. It has been found that he had no right to rescind the contract on this account, but the fact remained that he abandoned the land, violated the contract, and refuses to further perform. In such case, what are the plaintiffs' rights? Not to recover any part of the purchase price, but to recover damages, if any have been sustained. * * * As the court has found that the defendant did not and could not rescind the contract on the alleged fraud, but that he abandoned the premises without right to do so, and as this proposition is not involved in this branch of the case, the authorities cited demand no further attention. * * * The action at bar was brought as a law action, to recover a part of the purchase price. Defendant's answer was filed, and the case was transferred to the equity side of the docket. No change was made in plaintiffs' claim, or the character of the relief asked. It is yet an action to recover part of the purchase price of

the land. We have found defendant was not entitled to rescind the contract, but that he wrongfully abandoned or breached his contract. Defendant's answer must be dismissed on its merits, and this leaves the plaintiffs in court on a claim they cannot enforce, under the facts in this case. It follows that, in the judgment of the court, defendant's answer should be dismissed on its merits, and plaintiffs' petition should be dismissed, for the reason that they have mistaken their remedy for the breach of contract by the defendant. Judgment will be entered in this case in accord with the facts herein expressed, and further, that judgment shall be entered against each of the parties for the costs made by each, and no judgment shall be entered against one for the costs made by the others."

We have not attempted to set out all that the court said in its finding, upon which its decree was based, but enough to show that the case was fully tried and determined on the issues made, and that the court affirmatively found against the defendant on its contention that the contract was induced by fraud, and further found that, if induced by fraud, the defendant waived the fraud, and by his conduct is now estopped from asserting that he was fraudulently induced to make the contract, as a basis for relief, and found affirmatively that this claim did not defeat plaintiffs' right to recover the purchase price.

In its ultimate finding, the court said to the defendant:

"I have examined your testimony touching the fraud which you claim was practiced upon you to induce you to enter into this contract. You have not sustained this claim, and plaintiffs' right to recover cannot be defeated upon this contention. No fraud was practiced upon you; and, if it were, you have waived the fraud, and are now estopped to insist upon it against the claim which the plaintiffs are urging against you, and this claim is dismissed for want of merit."

It said to the plaintiffs:

"It is true the defendant had no right to abandon this land. You practiced no fraud upon him, but he has attempted to rescind the contract, though wrongful, has abandoned the land, and you have taken possession, and are now in possession, and have been in possession for some years. You have acquiesced in his wrongful rescission of the contract. The contract is, therefore, as between you and him, at an end. You cannot maintain a suit for part of the purchase price provided for in the contract. If you can, then you can consent to a rescission of the contract, and hold the defendant to its performance, and recover from the defendant the whole consideration provided for in the contract, at the same time taking back and receiving from the defendant the consideration which you gave for his promise."

We are not unmindful of the fact that what was said by the court is no part of its decree; but the decree itself states that defendant's contention was dismissed on its merits, and this statement of the decree is fully confirmed by an examination of the records. The defendant had his day in court upon the contention now made, and the court has determined his contention against him. He is now estopped to relitigate it, or to base any claim upon facts adjudicated against him in that trial. As said in *Goode now v. Litchfield*, 59 Iowa 226, 231:

"The rule, as appears to be well stated by all the authorities, is that, where a former judgment or decree is relied upon as a bar to an action, it must appear, either by the record or by extrinsic evidence, that the particular matter in controversy and sought to be concluded was necessarily tried and determined in the former action."

In *Hahn v. Miller*, 68 Iowa 745, 748, it was said:

"The general rule undoubtedly is that the judgment of a competent court is conclusive between the parties upon

all questions directly involved in the issue and necessarily determined by it."

In equity cases, where a number of matters are raised by the pleadings, and the judgment may proceed upon some one of them, and not upon the others, the opinion or ruling of the court is properly considered for the purpose of determining the precise matter which is adjudicated by the judgment.

2. JUDGMENT:
matter lit-
igated: opinion
of court.

It is true that, in the Dallas County court, the plaintiffs were not defeated on the ground that they had or had not practiced fraud upon the defendant in procuring the contract, but the defendant tendered that issue, and sought relief against the obligations of the contract upon that issue. He urged that issue defensively to the court, and the court found against him on that issue, and dismissed his answer and cross-petition on its merits. The plaintiffs were defeated upon another ground, also urged by the defendant; but this makes the finding of the court, embodied in its decree, no less binding on the defendant than if defendant had obtained relief from the obligation of his contract on this matter pleaded. Had defendant sustained the matters set up in his answer and cross-petition, based upon the alleged fraud practiced upon him in procuring the contract, it would have put an end to plaintiffs' case. Plaintiffs could not have recovered any part of the consideration, based upon a contract into which they had fraudulently induced defendant to enter. Defendant sought relief from the obligations of his contract upon this ground, and introduced evidence to support this contention. This evidence was reviewed by the court, and found not to sustain the contention. Upon this review and this finding, the court dismissed his contention, and ordered his cross-petition dismissed upon its merits. See *Watson v. Richardson*, 110 Iowa 698.

In *Black v. Miller*, 158 Iowa 293, 298, this court said:

"Where there is a hearing, and no such words as 'without prejudice' appear in the decree, and no reason for dismissal is stated therein, and a decision on the merits is in no wise negatived, the issues raised are presumed to have been raised and decided on the merits."

Upon the whole record, we think the court was right in its holding that the matter urged by the defendant in the counterclaim now in suit was adjudicated in the Dallas County action, and defendant is now estopped to re-adjudicate it here, and its action is—*Affirmed*.

WEAVER, C. J., LADD and STEVENS, JJ., concur.

ED. ARNETT, Appellee, v. ILLINOIS CENTRAL RAILROAD COMPANY, Appellant, et al., Appellee.

CARRIERS: *Res Ipsa Loquitur*—Pleading and Proof. The particular acts of commission or omission which resulted in a collision of trains need not be alleged or proved by a passenger who was, himself, without fault.

CARRIERS: Carrier and Engineer as Defendants—Different Degrees of Care. Assuming, *arguendo*, that the duty to exercise the highest degree of care rests on both the defendant carrier and the defendant engineer, yet prejudicial error does not result from instructing that the engineer is only required to exercise ordinary care.

TRIAL: Instructions—Separate Submission of Issue as to Joint Defendants. Issues as to joint defendants charged with negligence may be separately submitted.

MASTER AND SERVANT: Exoneration of Servant as *Ipsa Facto* Exoneration of Master. The exoneration of a servant because of having exercised ordinary care will not exonerate a master who is obligated to exercise the highest degree of care; neither will the exoneration of the defendant servant from a charge of negligence exonerate the defendant master, when the record fails to show that the injury in question resulted solely from what the servant did.

Appeal from Black Hawk District Court.—H. B. BOIES,
Judge.

FEBRUARY 23, 1920.

ACTION for damages against the defendant railway company and its engineer on account of injuries received by a passenger as a result of a collision. There was a verdict in favor of the engineer and against the railway company. The latter appeals.—*Affirmed.*

George W. Dawson, Helsell & Helsell, and W. S. Horton, for appellant.

Sager, Sweet & Edwards, for appellee.

STEVENS, J.—I. Plaintiff alleged in his petition that he and his wife boarded one of defendant's east-bound passenger trains at Iowa Falls on the morning of December 7, 1917, and that, when the train reached Boyd, a passing station on defendant's line, located about 7 or 8 miles west of Cedar Falls, a collision occurred between the train upon which he was riding and a west-bound train, causing him to be thrown violently from his seat in the smoking compartment of the coach, breaking his right leg, and inflicting other severe and painful injuries upon him. This action was brought against the railway company and the engineer of the west-bound train.

The petition contained no allegations of specific acts of negligence, but charged that the collision "was due solely to the negligence and carelessness of the defendants." The defendants moved the court to require plaintiff to set out in his petition the particular acts of negligence complained of. The overruling by the court of this motion is the first matter argued by counsel for appellant. To make out a prima-facie case against the defendant railway company,

1. CARRIERS:
res ipsa loquitur: pleading
and proof.

plaintiff was only required to prove that he was injured, without fault upon his part, while a passenger upon the defendant's train, by a collision of said train, or other unusual occurrence. The prima-facie case thus made raised a presumption that defendant was negligent, and cast upon it the burden of exculpating itself therefrom. *Cronk v. Wabash R. Co.*, 123 Iowa 349; *Fitch v. Mason City & C. L. Traction Co.*, 124 Iowa 665; *Dorn v. Chicago, R. I. & P. R. Co.*, 154 Iowa 140; *Alsever v. M. & St. L. R. Co.*, 115 Iowa 338; *Weber v. Chicago, R. I. & P. R. Co.*, 175 Iowa 358; *Basham v. Chicago G. W. R. Co.*, 178 Iowa 998.

The facts constituting the negligence resulting in the collision were peculiarly within the knowledge of the defendant. Plaintiff was not bound to prove the particular acts of commission or omission upon the part of the employees of defendant which caused the accident, and was not, therefore, required to allege the same in his petition. The motion was properly overruled. *Scott v. Hogan*, 72 Iowa 614; *Gordon v. Chicago, R. I. & P. R. Co.*, 129 Iowa 747.

Counsel for appellant appeared in the court below for both defendants, and filed a joint answer admitting the accident, and alleged that same was purely accidental, and without fault on the part of either of said defendants, and denied generally the allegations of plaintiff's petition. The material facts are stated under another subdivision of this opinion.

II. Much of the complaint of counsel for appellant relates to the failure of the court to submit the issues against the defendants jointly. No exception was taken to the instructions by the defendant Dubois. The court stated in its instruction the degree of care required of each of the defendants separately, as follows:

2. CARRIERS: carrier and engineer as defendants: different degrees of care.

"That it was the duty of the defendant James M. Dubois, in operating his train, to exercise ordinary care to

avoid collision with any other train, and a failure to exercise such care would be negligence;" and "that it is the duty of a common carrier of passengers to exercise the highest degree of care in transporting its passengers to their destination, and to this end it is its duty to see that nothing which human foresight could guard against happens in the operation, management, and control of its train, their equipment or its track, that will imperil the safety of its passengers, and a failure to perform such duty is negligence."

The exceptions taken to the instructions that are relied upon in the briefs and argument of counsel may be summarized as follows: (a) That plaintiff's cause of action, as alleged in his petition, is joint; that the only negligence, if any, disclosed by the evidence, resulting in the collision and consequent injuries to plaintiff, was the negligence of the engineer; and that the court should have submitted the cause jointly, holding both defendants to the same degree of care; (b) that the defendant engineer should have been held to the exercise of the highest degree of care; (c) that the court incorrectly summarized the particular acts of the defendant constituting negligence upon his part.

As stated above, plaintiff alleged in his petition that the collision was "due solely to the negligence and carelessness of the defendants," but no particular or specific acts of omission or commission are recited therein. The evidence disclosed the claim of defendants to be that the collision was due to extraordinary and unavoidable causes, and not to the negligence of the engineer or any other of the company's servants; that the track was so frosty that, when the air brakes were applied, the train slid upon the track, passed the switch, and collided with the train upon which plaintiff was riding; that all of the means available to the engineer were employed to stop the train, but, on account of the condition of the track, and the hard north-

west wind, which blew the sand therefrom, the engineer was powerless to stop the train in time to avoid the collision. The testimony of employees of the company who inspected the respective trains at Waterloo and Fort Dodge was offered in evidence, for the purpose of showing that every precaution was taken by appellant to have its equipment in the usual working order. Evidence was also introduced to the effect that the engineer and conductor upon the east- and west-bound trains had orders to pass at Boyd, and that Dubois knew that the east-bound train was to take the siding, for the purpose of permitting the west-bound train to pass. The petition does not charge that the sole negligence of the defendants was the failure of the engineer to stop the train in time to avoid the collision. The charge is that the negligence of both was the proximate cause of his injuries. So far, however, as the allegations of the petition are concerned, the negligence of the defendant company may have been due, in part, to the negligence of its codefendant, and also to negligence upon the part of other employees. The petition does not charge a joint cause of action, but that the injuries received by plaintiff were due to the negligence of both defendants. The equipment of the engine and train in charge of defendant, the direction and movement of both trains, the condition of the roadbed and track, were under the control and supervision of the company, together with all the instrumentalities of transportation. The duty of the engineer was confined to the proper movement and operation of his engine and train. Both defendants might have been guilty of actionable negligence, but not necessarily in the failure to perform the same duty.

The submission of the issues separately to the jury was not necessarily in itself erroneous, or prejudicial to appellant. If, in the judgment of the court, they could be more

8. TRIAL: instructions: separate submission of issue as to joint defendants.

clearly understood and comprehended by the jury, if submitted separately, than jointly, it would not be an abuse of the court's discretion to submit them in that way. The real question presented by the exception to the instruction upon this point is whether, assuming that the court should have informed the jury that it was the duty of both defendants to exercise the highest degree of care, the submission separately of different degrees of care was prejudicial to appellant. No instruction defining the degree of care required of the engineer was requested by appellant. It is conceded that the defendant company, as a common carrier, is bound to the exercise of the highest degree of care for the safety of its passengers. The instruction, therefore, submitting the issues as against appellant is not vulnerable to attack.

The court, in its tenth instruction, included a statement of particular acts, the failure to perform which would constitute negligence upon the part of the engineer. This statement was gathered from the evidence, and is apparently a complete statement of the duty of the engineer, under the circumstances shown. If, as contended by counsel for appellant, the jury should have found from the evidence that the only negligence, if any, upon the part of its employees, causing the collision, was the failure of the engineer to exercise the highest degree of care, how was appellant prejudiced by an instruction imposing upon him the duty to exercise ordinary care only? There was nothing in the manner in which the case was submitted to arouse the passion or prejudice of the jury against appellant, nor was a higher duty imposed upon it than the law required. We are of the opinion, therefore, that, conceding that the engineer was improperly held to the duty of exercising ordinary care only,—a question we do not pass upon,—appellant

was not prejudiced thereby, unless because of matters hereinafter suggested.

III. At the request of counsel for defendants, the court instructed the jury to return separate verdicts, with the result already stated. Thereupon, appellant moved the court for judgment in its favor, notwithstanding the verdict against it, upon the ground that, if the collision and the consequent injuries to plaintiff were due to the negligence of defendants, it was due solely

4. MASTER AND SERVANT: exoneration of servant as *ipso facto* exoneration of master.

to the negligence of Dubois in failing to stop the train before it reached the switch, and that, as the liability of appellant rested solely upon the doctrine of *respondeat superior*, the exoneration of Dubois vitiated the verdict against it, and relieved it from liability. This motion was overruled, and this ruling is assigned as error.

It has been frequently held that, in joint actions against the master and its servant for negligence, where the sole negligence shown is the negligence of the servant, a verdict exonerating the servant vitiates a verdict holding the master liable. *Stevick v. Northern P. R. Co.*, 39 Wash. 501 (81 Pac. 999); *Zitnik v. Union P. R. Co.*, 91 Neb. 679 (136 N. W. 995); *Chicago, R. I. & P. R. Co. v. Reinhart*, (Okla.) 160 Pac. 51; *St. Louis & S. F. R. Co. v. Williams*, 55 Okla. 682 (155 Pac. 249); *Doremus v. Root*, 23 Wash. 710 (54 L. R. A. 649); *Hobbs v. Illinois Cent. R. Co.*, 171 Iowa 624; *New Orleans & N. R. Co. v. Jopes*, 142 U. S. 18 (35 L. Ed. 919).

But a verdict in favor of the servant, in a joint action against the master and such servant, relieves the former from liability only when the negligence of the servant was the sole proximate cause of the injuries complained of. *Popplar v. Minneapolis, St. P. & S. S. M. R. Co.*, 121 Minn. 413 (141 N. W. 798); *Carver v. Luverne B. & T. Co.*, 121 Minn. 388 (141 N. W. 488); *Doran v. Chicago, St. P., M. &*

O. R. Co., 128 Minn. 193 (150 N. W. 800); *Usher v. American Smelting & R. Co.*, 97 Neb. 526 (150 N. W. 814); *Webster v. Chicago, St. P., M. & O. R. Co.*, 119 Minn. 72 (137 N. W. 168); *Lake Erie & W. R. Co. v. Reed*, 57 Ind. App. 65 (103 N. E. 127).

The Indiana court, in the case last cited, stated the rule as follows:

"This doctrine rests upon the principle that the master or principal is chargeable with the negligent act committed by his agent while engaged in the discharge of the duty of such master or principal, and, under this doctrine, where the master or principal is charged, along with its agent, in doing a particular negligent act which resulted in injury, and which the master could do *only by and through such agent*, a verdict which would acquit the agent of the negligent act, and at the same time hold the master or principal liable, would be intolerable. This would be so, however, because, in such case, the master or principal's guilt or liability *necessarily depended on the guilt of its agent*. It does not follow that a master and one of his agents may not be sued together for their separable acts of negligence resulting in a common injury, and either held liable and the other discharged from such liability."

All of the testimony offered by defendants was for the purpose of meeting the prima-facie case made by plaintiff, and to overcome the presumption of negligence arising from the facts shown. The duty rested upon appellant to offer such evidence as would show itself free from negligence proximately causing plaintiff's injuries. To accomplish this purpose, the testimony of the defendant engineer and the two conductors in charge of the trains, together with that of the employees who inspected the respective trains at Waterloo and Fort Dodge, was offered. From this testimony it appears that the accident occurred at Boyd, a passing station, located a short distance west of Waterloo, on

the morning of December 7, 1917, but the exact hour is not shown; that the accident occurred in the neighborhood of 300 feet west of a switch, which the east-bound train had orders to take, and was slowing down for that purpose; that the road ran in a practically straight line from a point about half a mile east to a point about 900 feet west of the switch, where it curved to the south through a cut, and, about half a mile east thereof, to the north. The west-bound train left Dubuque at 4:45 in the morning, and the east-bound train had come from Fort Dodge. Both conductors and the defendant engineer testified that they had orders to pass at Boyd, the east-bound train to go upon the passing track. The conductor of the east-bound train testified that he had given the engineer a copy of the order to pass No. 13 at Boyd, and had also given him the usual passing signal, and that the speed of the train, at the time of the collision, was about 10 miles an hour. The defendant engineer testified that, in approaching Boyd, his train ran down grade; that he shut off the steam about a mile and a half east of the switch, and moved the lever to work the air brakes about a quarter of a mile east of the switch, at which time the speed of his train was from 15 to 18 miles per hour. He further testified that the morning was very frosty; that the track, at the point in question, is located in a creek valley, and the rails appeared to be somewhat more frosty than elsewhere; that, when the brakes were applied to the wheels, they slid upon the track; and that he was unable, by the use of all the instrumentalities available, to stop the train in time to prevent the collision, but that it was just about stopping when the collision occurred; that he applied sand to the track, but that a strong wind from the northwest blew it off, so that it did no good. The conductor on this train testified that, when the whistle sounded for Boyd, he gave the passing signal to the engineer; that he was in the rear end

of the smoking car; that he noticed that, about a quarter of a mile from the switch, the brakes went on, but that they did not seem to hold very well; that the train, however, slowed down; that he noticed nothing unusual in its running or stopping, until they had passed the point where it should have come to a standstill. The engineer and two car inspectors at Waterloo, and one employed at Fort Dodge, together with the conductors and defendant engineer, all testified that the cars and air brakes were inspected upon the respective trains at Fort Dodge and Waterloo, in the usual manner of inspecting same, and that everything worked all right and as usual. The engineer upon the east-bound train was deceased at the time of the trial. None of the other trainmen were called as witnesses. No evidence was offered tending to show that difficulty was experienced because of frost upon the rails, by the employees in charge of the east-bound train, nor does it appear that the same interfered with the movement or stopping of the trains at other stations on the date in question.

No motion was offered on behalf of either defendant for a directed verdict, nor is it claimed by appellant, upon this appeal, that the evidence was insufficient to sustain the verdict in favor of plaintiff; so that our discussion is limited to the inquiry whether the verdict exonerating the defendant engineer vitiated the verdict against appellant. The finding of the jury goes no further than to hold that Dubois exercised ordinary care. Whether he failed to exercise the highest degree of care is not answered by the verdict, nor can the court say what the jury would have found, if that question had been submitted to it. Its finding that Dubois exercised ordinary care is by no means equivalent to a finding that he exercised the highest degree of care. The verdict does not, therefore, establish that appellant exercised the degree of care admittedly required of it as a carrier of passengers, nor do we think the record sustains the

contention of counsel that the jury was bound, under the evidence, to find that, if the collision was the result of negligence on the part of anyone, it was solely the negligence of the engineer. It is not sufficient to relieve defendant of liability for it to show that the facts and circumstances are as consistent with care as with negligence. *Weber v. Chicago, R. I. & P. R. Co.*, 175 Iowa 358. It must fully meet the presumption of negligence arising from the prima-facie case made out by plaintiff. The roadbed, the equipment, and the direction, movement, and operation of both trains were under the control of appellant railway. The scope of the engineer's duty was limited to the proper movement and control of the engine, of which he had charge. The west-bound train had, so far as the evidence shows, proceeded from Dubuque on the morning in question without encountering difficulty in stopping the train, and without encountering difficulty thereafter; nor is it claimed that the east-bound train had experienced similar difficulty, either upon the occasion in question or earlier that morning. The occurrence was unusual and extraordinary, and the jury may have found that it was due to some failure upon the part of appellant, not necessarily chargeable to Dubois. It might have found that he employed all the means within his power to stop the train, as he testified, and that he was not, therefore, negligent; but it evidently did not find that the collision was due solely to the negligence of the engineer. No claim is made by counsel that the evidence did not justify the submission of the issues to the jury, nor do we see how such claim, if made, could be sustained. The finding of the jury may be inconsistent; but, if there was sufficient evidence to justify submission of the issues as against appellant, this alone would not entitle it to a new trial. It is possible that, if the court had submitted the issues jointly, holding both defendants to the highest degree of care, the verdict would have been different; and certainly,

a different question would have been presented for our consideration. We cannot say, however, upon the record before us, as a matter of law, that the negligence of the engineer, if shown, was the sole and only cause of the collision; nor was appellant, in our opinion, prejudiced by the instructions complained of. The issues were, so far as appellant is concerned, properly submitted.

IV. We have already disposed of all the questions covered by appellant's brief and argument, except that considerable space is occupied in the statement of facts for the purpose of emphasizing the claim of appellant that the verdict is excessive, and the refusal of the court to give a requested instruction. Plaintiff received what is known as a "green stick" fracture of the large bone of his right leg, was confined to the hospital for a brief time, suffered a great deal of pain, went about upon crutches, 6 or 8 weeks, and lost considerable time; and, while the verdict is, doubtless, substantial, the amount is not so large as to suggest passion and prejudice on the part of the jury, and we think it should be permitted to stand. The substance of the requested instruction was given by the court in its charge, and no prejudicial error resulted from the refusal to give the same as asked. We have given careful consideration to the entire record, and to all matters covered by the brief points and argument, and find no reversible error. The judgment of the court below is, therefore,—*Affirmed*.

WEAVER, C. J., LADD and GAYNOR, JJ., concur.

H. L. AUGUSTINE, Appellee, v. W. J. GOLD, Appellant.

PLEADING: Construction—Understanding of Parties. Pleadings

- 1 will be construed in harmony with the mutual understandings of the parties, while the real merits are under consideration. Belated construction, born of a desire for technical advantage,

will not be tolerated. So held where exemption claim was made to *brown* mules, when they were *bays*.

EXEMPTIONS: Team—Mortgage Without Concurrence of Wife. A 2 team habitually used by a farmer to earn his living is exempt, and a mortgage thereon without the concurrence and signature of the wife is absolutely void, even though the farmer has other teams with which he does not earn his living.

Appeal from Taylor District Court.—H. K. EVANS, Judge.

NOVEMBER 15, 1919.

REHEARING DENIED FEBRUARY 23, 1920.

ACTION of replevin, based on a mortgage. Opinion states the facts. Judgment for the plaintiff. Appeal by the defendant.—*Reversed*.

Frank Wisdom, for appellant.

Flick & Flick, for appellee.

GAYNOR, J.—This is an action at law, to recover the possession of a span of mules. Plaintiff bases his right to possession on a chattel mortgage, made, executed, and delivered to him by the defendant. The property covered by the mortgage is described in the mortgage as follows:

1. PLEADING:
construction:
understanding
of parties.

“One bay mare mule five years old, weight 1,200 pounds, named Kate, white nose and belly. One bay horse mule, 5 years, weight 1,200 pounds, named Jerry, white nose. One brown mare mule, age five years old, weight 1,150 pounds, black nose and legs, scar on right front foot. One brown mare mule, age five years old, weight 1,150 pounds, white nose and belly.”

It is recited therein that the above mortgage is given subject to a mortgage of T. S. Shay for \$350.

In his petition, plaintiff asked the possession of one brown mare mule, age five years, weight about 1,150

pounds, black nose and legs; scar on right front foot; and one brown horse mule, age five years, weight 1,150 pounds, white nose and belly. A writ of replevin was issued for the mules described in the petition. The writ was passed into the hands of an officer for service. The officer went to defendant's place with the writ, and found him in possession of a bay mare mule and bay horse mule, and levied the writ on the mules so found in defendant's possession. Thereupon, defendant executed a delivery bond, and these bay mules were released to him. The delivery bond, however, followed the description in the writ of replevin, and described the mules taken as they were described in the petition and in the writ. Defendant appeared in the replevin action, and admitted in his answer that, on the 29th day of January, 1917, he executed and delivered to the plaintiff a certain mortgage on said property, but claimed that the same was exempt to him at the time the mortgage was given. The exemption was predicated on the fact that he was, at the time the mortgage was given, "a farmer, a married man, and the head of a family," and that the mules were a team by which he habitually earned a living for himself and family; that his wife never signed the mortgage; that the mortgage was, therefore, void and of no effect. The plaintiff replied, denying the exemption.

Upon this issue, the cause was tried to the court, a jury being waived, and the court found that the brown mare mule and the brown horse mule described in the petition and in the writ of replevin were worth \$160 each; found that plaintiff is entitled to the possession of the same under his mortgage, and that the claim of exemption was not well founded. The value of plaintiff's right therein was fixed at \$316, with 8 per cent interest from the 29th day of January, 1917. Judgment was, therefore, entered against the defendant for the value of the mules described in the petition. From this, defendant appeals.

It will be noted that the mortgage does not cover a *brown horse* mule. The only horse mule described in the mortgage is a *bay* horse mule. The writ of replevin and the delivery bond both describe a brown horse mule. It is apparent, therefore, that the plaintiff did not follow the descriptions in the mortgage accurately; either in his petition or in his writ. It appears, without dispute, from the testimony of T. S. Shay, the party named as prior mortgagee, that he, Shay, sold the defendant the bay mules in December, 1915, and the brown mules on the 29th day of January, 1917; that he took a mortgage on both teams, to secure the payment of a note given for the last-named team. Later, Shay told the defendant that, if he returned the last-named team (being the brown mules), he would give him his note. The defendant did return and deliver to Shay the brown mules, and Shay gave him his note. This was done before the replevin suit was commenced; so that, at the time the replevin suit was commenced, defendant did not have in his possession either of the brown mare mules. The only team he had in his possession was the bay mare mule and the bay horse mule described in the mortgage. The levy was not made upon the property described in the petition, nor upon either of the brown mules. The replevin writ was levied only upon the bay mules, neither of which answers the description in the petition or in the writ. In making the delivery bond, the scrivener followed the description made in the writ of replevin, and described a brown horse mule and a brown mare mule. There seems to have been confusion between the parties as to the mules covered by the mortgage, and the mules sought to be recovered under the writ of replevin. There was no brown *horse* mule mentioned in the mortgage. One of the brown mare mules and the bay mare mule are described in the mortgage exactly alike, except as to color and weight, and differed but 50 pounds in weight.

It is apparent that, if defendant had not executed the delivery bond, plaintiff would have taken and held, under his writ of replevin, the bay mules. It is apparent that the delivery bond was given to release from the writ the mules actually taken under the writ, and no other; for defendant had no other at the time. It is the contention of the plaintiff that the giving of this delivery bond was an admission that defendant had the brown mules, and that they were in his possession, and that he is now estopped to claim that he did not have the brown mules in his possession, and that they were not subject to the writ.

It is further contended that, in his pleading, the defendant claimed exemption only as to the property described in plaintiff's petition, to wit, the brown mules, and that he made no claim of exemption as to the bay mules; that, as no claim was made to the bay mules, the answer setting up the exemption must have had reference to the mules described in the petition.

This construction of defendant's pleading is not tolerable. At the time the answer was filed, the bay mules had been taken, and it was the bay mules that were released under the delivery bond. Plaintiff did not own the brown mules; they were not in his possession; and the evidence does not disclose that they had ever been used by the defendant, so as to bring them under the exemption statute. The answer, therefore, must have had reference to the bay mules taken under the writ, and we think it was so understood by all the parties until later in the controversy, when it was thought to hold plaintiff to a claim of exemption only as to the property described in the writ, and not as to the property actually taken. At the time the replevin writ was served, the plaintiff owned but one team of mules, and this was the team by which he habitually made his living. We will refer to this exemption statute later.

The plaintiff did not plead waiver or estoppel, and we think there is nothing in this contention.

There was evident confusion in the minds of all parties as to the description of the property sought under the writ, the property levied on under the writ, and the property released by the bond. As said before, the bond was given only to release from the writ the property actually taken under the writ, and for no other purpose. The brown mules had passed into the hands of a prior mortgagee, were not in the possession of the defendant, were not levied upon by the plaintiff under his writ, and, at the time the bond was given, the plaintiff was not holding them under his writ. The whole transaction involved in the giving of the bond had relation to the bay mules taken under the writ, and it was to release these mules from the writ that the bond was given. While some confusion has arisen out of these misdescriptions and inattention to proper descriptions in drawing the papers, yet there is no confusion as

2. EXEMPTIONS:
team: mortgage
without con-
currence of
wife.

to the rights of the parties involved in this suit. There is but one question here for our consideration, and that is whether or not these bay mules, taken under the writ and released by the bond, were exempt to the defendant at the time the mortgage was given. If they were, then, under Section 2906 of the Code of 1897, the mortgage is void as to them, for this section provides that:

"No incumbrance of personal property which may be held exempt from execution by the head of a family, if a resident of this state, * * * shall be of any validity as to such exempt property only, unless the same be by written instrument, and unless the husband and wife, if both be living, concur in and sign the same joint instrument."

It is conceded here that the wife did not sign this mortgage, and the undisputed evidence shows that defendant was a resident of the state, a married man, and the head of

a family at the time. The question then arises, Was the property exempt? Much testimony has been introduced, tending to show that the defendant had other property, horses and mules, at the time this mortgage was executed. He may have had. Whether he had or not is immaterial, since none of the other property was exempt, under any of the provisions of the statute. The question here is governed by Section 4008 of the Code of 1897, which provides:

"If the debtor is a resident of this state and the head of a family, he may hold exempt from execution the following property: * * * If the debtor is a * * * farmer, teamster or other laborer, a team, consisting of not more than two horses or mules * * * with the proper harness or tackle, *by the use of which he habitually earns his living.*"

It is not a question of selection. It is a question of actual exemption under the statute. Certain specific property is exempt, when certain facts exist. A team of mules is exempt when the debtor is a resident of this state, the head of a family; but the only team exempt is the one by the use of which he habitually earns his living, and no other, and any mortgage given upon a team so exempt is void, under the statute heretofore referred to. A different question might arise if the debtor had more than one team by which he habitually earned his living. The exemption is made for the benefit of the family. It rests in sound public policy. It is made to protect the family against the improvident conduct of the husband. The mortgage is, as to exempt property, of no validity, unless the wife concurs in and signs the same joint instrument. What is the evidence here? It is admitted that the plaintiff is a farmer, and a resident of this state. The proof is complete that he is the head of a family; that he has a wife and children, living together as a family. The undisputed evidence is that the bay team was purchased in 1915; that the brown mules re-

ferred to in the mortgage were not purchased until 1917; that the plaintiff has habitually used these bay mules in earning his living, ever since he purchased them. There is no evidence that he has ever used the brown mules for any purpose, or that he has used any other team for any purpose connected with the earning of his living.

The mortgage is, therefore, void as to the bay mules. The plaintiff cannot and does not waive his exemption by giving the mortgage, nor can he waive it after giving the mortgage. The exemption and the inhibition against incumbrance are made for the benefit of the family; and, unless the wife concurs in the mortgage, it has no validity as to exempt property. The law makes the exemption when the facts exist upon which the exemption rests, and the inhibition runs against the making of a mortgage on property that is exempt. We find nothing in *Grover v. Younic*, 110 Iowa 446, that runs counter to anything we have here said. The syllabus does not express the rule therein stated.

Estoppel rests on the thought that the party urging the estoppel has been prejudiced by the action of the other party who is sought to be estopped. If these bay mules are exempt under the statute, and we find they are, the plaintiff has lost nothing by surrendering them to the defendant; for he could not have held them under a void mortgage. The giving of the delivery bond neither added to nor took from the plaintiff any right that he had at the time the delivery bond was given. There is no evidence that defendant ever selected, or gave anyone reasonable ground for believing that he selected, as exempt, any other property, or any other team than the bay mules in question.

Upon the whole record, we think the court should have found for the defendant, and its action is, therefore,—*Reversed*.

LADD, C. J., WEAVER and STEVENS, JJ., concur.

LENA H. BANKS, Appellee, v. C. C. TAFT COMPANY, Appellant, et al.

JUDGMENT: Default—War Activities as Excuse. Refusal to set aside a default will be reversed, when it appears that counsel intended in good faith to defend, and was prevented from so doing by the war activities in which he was engaged, coupled with a pardonable misunderstanding as to an adjournment of court.

Appeal from Story District Court.—R. M. WRIGHT, Judge.

NOVEMBER 15, 1919.

REHEARING DENIED FEBRUARY 23, 1920.

SUIT brought in equity to establish a claim for rent, and for foreclosure of a chattel mortgage. The defendants were held to be in default for want of answer, and decree entered as prayed. Thereafter, the defendant C. C. Taft Company appeared, and filed motion to set aside decree and default. Motion overruled, and defendant appeals.—*Reversed.*

Strock, Wallace & McConlogue, for appellant.

J. F. Martin, for appellee.

PER CURIAM.—The original notice was served upon appellant in time for the term of court in Story County beginning September 23, 1918. An appearance was entered by counsel for appellant by mail or telephone, on or before the first day of said term. No answer being filed, the default of appellant was entered on September 24, 1918, and on October 2, 1918, judgment was rendered for plaintiff, as prayed. Thereafter, on October 9, 1918, and still at the same term of court, appellant, by mail, filed an answer in the clerk's office. On receipt of this answer, the clerk informed appellant's counsel that a default and judgment had already been entered; and, on October 17, 1918, defendant's motion was filed to set the same aside, and permit trial

to be had on the merits. Resistance was made to the motion, and it was overruled.

Supporting the motion were affidavits of appellant's counsel and others, tending to show a bona-fide intention on part of appellant and its counsel to defend the action on its merits; that, on the morning of the second day of the term, a clerk in the counsel's office, acting upon their instruction, called up the office of the clerk of the Story district court by telephone, to ascertain if time would be given for filing answer, and was informed by the clerk or his deputy that, owing to the interference with court business by the absorption of the attention of members of the bar and others in matters growing out of the state of war then existing, and preparations for the draft about to be made, court was about to adjourn for a time, and that there would be at least two weeks in which the answer could be filed; that counsel relied upon said information, and, being themselves busily engaged in assisting and forwarding preparation for the draft, to the exclusion of their ordinary professional business, did not prepare and forward the answer in this cause until the last day of the two weeks' period, and had no knowledge that a default or judgment had been rendered, until so informed by the clerk, on receipt of such answer; and that, on being advised of the situation, counsel at once prepared appellant's motion to open up the judgment and default.

Appellee's resistance to the motion is supported by affidavits of her counsel and of the deputy clerk, denying that any undue advantage was taken of the appellant, and denying that, in the telephone conversation between the clerk's office and the office of appellant's counsel, on the first or second day of the term, any information was given that the court would adjourn for two weeks, or that appellant would have two weeks in which to answer, but alleging that the sum and substance of the call from counsel's office was an

inquiry to make sure of the entry of their appearance in the case.

There is some misunderstanding between parties, counsel, and affiants as to matters of detail, but we are convinced that no one of those concerned on either side has acted otherwise than in entire good faith. Ordinarily, where the ruling upon motions of this character is made to turn in any material degree upon facts which are the subject of dispute, we consider ourselves bound by the finding of the trial court, and refuse to interfere with its order; but this case presents some peculiar features, which we think ought not to be ignored. It is a matter of common knowledge that the summer and autumn of 1918 were the critical period in the world war in which this nation was then engaged, and that the people of every rank, class, and occupation were intensely absorbed in patriotic work of various kinds; that proceedings in trial courts were generally interrupted, and to a considerable degree disorganized; and that most lawyers gave their attention very largely to such work, and especially to rendering assistance in the general preparation then being made for the draft about to be made for the selection of persons for military and naval service. It is to this cause, we think, that the misunderstandings in this case may be attributed. Mistakes and oversights thus occasioned may well be condoned, if application therefor be made with reasonable promptness, and no irreparable injury is likely to result to the opposing party.

In our opinion, the case here presented calls for the exercise of this discretion, and the ruling of the trial court will be reversed, and cause remanded, with directions to set aside the default and judgment, and permit the defendants' answer to stand.—*Reversed.*

ELIZABETH KING et al., Appellants, v. JOHN COLE, Appellee.

HOMESTEAD: Trust Deed—Construction. Trust deed to a homestead by heirs of the deceased parents, conditioned "to pay the debts" of the parents, construed, in the light of explanatory evidence, and held to embrace only the debts attending the funeral expenses consequent on the death of the parents.

EVIDENCE: Parol as Affecting Writing—Identifying Subject-Matter of Trust Deed. Parol evidence is admissible to identify the debts for the payment of which a trust deed has been given.

Appeal from Monroe District Court.—H. F. WAGNER, Judge.

FEBRUARY 23, 1920.

SUIT in equity, for the establishment of a lien upon real property, and to foreclose the same. The court below dismissed plaintiff's petition, and she appeals.—*Affirmed.*

Dan Davis and Liston McMillen, for appellant.

McCoy & McCoy, for appellee.

STEVENS, J.—Robert and Elizabeth Cole were husband and wife, and owned a residence property in Oskaloosa, Iowa. Robert Cole died June 1, 1916, but Elizabeth died two or three years earlier. Robert Cole

1. **HOMESTEAD:** and his unmarried son, Ralph, continued trust deed: to reside in the homestead until his death. construction.

The title to the property was in Elizabeth Cole. In September, 1915, Robert and Ralph Cole conveyed their undivided interest in the homestead to the defendant, John Cole, and, on June 6, 1916, Barbara Newton and husband, Richard Cole and wife, and Maggie Blake and husband, who were heirs at law of Elizabeth Cole, jointly executed a quitclaim deed, conveying their interest in the property to the defendant, John Cole, as trustee. The deed,

which was a quitclaim, recited a consideration of \$1.00 and other valuable consideration, and provided that:

"The said John Cole, trustee, is to sell the said property and after the payments of the debts of Elizabeth Cole and Robert Cole, including the funeral expenses and last sickness and all other of their said debts and after said John Cole trustee pays the said debts and obligations he is to divide up the proceeds from the sale of said property, as provided by law. The said John Cole is to be allowed interest on all debts paid until said sale."

Plaintiff Elizabeth King, a niece of Robert Cole's, on March 3, 1915, went to live with and take care of him, remaining an inmate of his home until August 7th, a period of 157 days. This action was brought by her against John Cole, trustee. She alleges in her petition, in substance, that Robert Cole was, at the time of his death, indebted to her for the reasonable value of her services, which she fixed at \$400, and prayed that same be decreed a lien upon the residence property; that it be foreclosed; and for special execution. No administration was had of the estate of either Elizabeth or Robert Cole. None of the grantors named in the alleged trust deed are made parties to this suit.

Shortly after plaintiff's petition was filed, John Fowler, father of plaintiff, filed a petition in intervention, setting up a judgment of \$24.60 against Robert Cole for services rendered. The defendant, for answer to the petition of plaintiff and the petition in intervention of John Fowler, admitted that Elizabeth Cole died seized of the property described in the trust deed, and that same was the homestead of herself and husband; admitted the execution of the instrument in question; and averred that same was executed for the purpose of securing said defendant for sums advanced by him on the burial expenses of Elizabeth Cole, and to be advanced in payment of the funeral expenses of

Robert Cole, and a tombstone to be erected at their graves, and denying generally the remaining allegations of the petition, and specifically denying that Robert Cole was, at any time, indebted to plaintiff, as alleged in her petition.

Plaintiff, at the time the services were rendered, was about 16 years of age, and whatever arrangement was made therefor with Robert Cole was with John Fowler. The evidence as to what the agreement was, and the character and extent of labor performed, is in conflict. It is agreed, however, that Robert Cole was partially paralyzed, and, the evidence tends to show, constantly required a great deal of care. Fowler testified that he made the arrangement for his daughter to work for Cole, and that he agreed to pay her for her services. Plaintiff testified that she lifted him from and onto the bed, and that she bathed and cared for him like a child. Ralph Cole testified that she performed none of these services; that it was understood, when she came, that Robert Cole would pay her if he could,—otherwise, nothing was to be paid; that she left because Ralph was unable, out of his wages as a section hand, to pay the expenses of the household. He further testified that he purchased articles of clothing for the plaintiff, and gave her spending money. The amount expended in this way is not stated. It appears without dispute in the evidence that the defendant paid the burial expenses of his father and mother, and erected a tombstone at their graves, at a total expense of \$500. None of his brothers or sisters were able to contribute to these expenses. At the time of his father's death, he had not been reimbursed for the funeral expenses of his mother. The defendant, Richard Cole, Maggie Blake, and George Blake testified, without objection, that, shortly after the death of Robert Cole, they, with the defendant and the other grantors, met at a law office in Oskaloosa, at which time the trust deed was made out and signed. From their testimony it appears that defendant

was objecting to paying his father's funeral expenses, unless some provision was made by his brothers and sisters, to secure or reimburse him therefor; that the real purpose of the trust deed was to secure the repayment of the money already paid, and money to be advanced in settlement of his father's funeral expenses, and for the erection of a tombstone; and that no other debts were referred to. This evidence is contradicted only in part by Barbara and William Newton, who testified that they wanted the terms of the deed fully carried out, and plaintiff paid.

It is further disclosed in the evidence that plaintiff, on September 14, 1915, caused an original notice to be served upon Robert Cole, claiming \$196.25 to be due her for the services rendered. The petition subsequently filed was verified by John Fowler. Robert Cole answered this petition, denying its allegations. The petition was voluntarily dismissed by plaintiff. On November 22, 1917, plaintiff, jointly with Barbara Newton, brought a suit against John Cole, asking that the deed of Robert Cole, conveying his undivided interest in the homestead to the said John Cole, be canceled, set aside, and held for naught, upon the ground that Robert Cole was mentally incompetent to execute the same. In the last petition referred to, plaintiff alleged that the value of her services was \$316. This action was also voluntarily dismissed, after answer had been filed.

Neither the grantee nor any of the grantors named in the trust deed were liable for the payment of the claims of plaintiff or intervener, and the property conveyed thereby was not liable for the payment of the debts of either Elizabeth or Robert Cole.

It is apparent, from what is said above, that Robert Cole denied that he was indebted to plaintiff or intervener, and that payment thereof has been at all times resisted by

2. EVIDENCE:
parol as affect-
ing writing:
identifying sub-
ject-matter of
trust deed.

the defendant. The quitclaim deed in question does not designate the debts of Elizabeth and Robert Cole that are to be paid out of the property, but the evidence is quite conclusive that the parties had funeral expenses and monument in mind, and that the real purpose of the conveyance was to secure the payment of the amount previously advanced, and to be advanced by the defendant in the payment of funeral and other expenses. We are satisfied that the parties did not contemplate or intend the payment of either the plaintiff's or intervener's claims. They were in dispute, and have been contested at all times by the defendant. It is a familiar rule that parol evidence is admissible to show that a deed absolute upon its face was, in fact, intended as a mortgage. *Trucks v. Lindsey*, 18 Iowa 504; *Hughes and Dial v. Sheaff*, 19 Iowa 335; *Votaw & Hartshorn v. Diehl*, 62 Iowa 676; *Beroud v. Lyons*, 85 Iowa 482; *Bigler v. Jack*, 114 Iowa 667; *Bradford v. Helsell*, 150 Iowa 732.

The evidence in this case is overwhelming that the purpose of the execution of the instrument in question was to secure the defendant for certain obligations paid or to be paid, and that the parties did not intend to create a trust for the payment of any and all claims that might be asserted against the estate of Elizabeth or Robert Cole. If plaintiff rendered the services claimed, which we think the evidence tends to sustain, it is unfortunate that same cannot be paid for. It is true that her demands have not been consistent; but she seeks to recover the reasonable value of her services, and the evidence as to the length of time she worked is without substantial dispute. The court below denied both plaintiff and intervener the relief demanded. We are compelled, upon the record before us, to reach

the same conclusion; and it follows that the judgment and decree below are—*Affirmed.*

WEAVER, C. J., LADD and GAYNOR, JJ., concur.

GRANT PILLINGS, Appellant, v. POTTAWATTAMIE COUNTY et al., Appellees.

HIGHWAYS: Egress and Ingress—Damages (?) or Equitable Re-

1 **lef (?)** An owner of land adjacent to an established highway may not maintain, against the county or its officers and agents, an action for *damages* consequent on the improvement of the highway by cuts and fills, but may maintain an action for *equitable* relief, if such improvement destroys or materially impairs his means of passing to and from his premises.

HIGHWAYS: Condemnation Includes Consequential Damages. Dam-

2 **ages** paid for land taken for a public highway are conclusively presumed to include such incidental damages to the farm as result from improving the highway.

Appeal from Pottawattamie District Court.—O. D. WHEELER, Judge.

FEBRUARY 23, 1920.

ACTION at law to recover damages. The facts on which the claim is founded are stated in the opinion.—*Affirmed and remanded.*

Charles Roe, for appellant.

C. E. Swanson, County Attorney, for appellees.

WEAVER, C. J.—For many years, a public highway has existed along the section line between Sections 24 and 25, in Township 74, Range 39, in Pottawattamie County.

1. HIGHWAYS:
egress and in-
gress: dam-
ages (?) or
equitable re-
lief (?)

Plaintiff owns a farm lying on both sides of said road, which separates his dwelling house from his barn and certain other out-buildings. East of the building site, the road is crossed by Graybill Creek from north to south. The surface of the land at and near the buildings is somewhat elevated; but, to the eastward, the road lies upon the flat or bottom land along the creek. Plaintiff had improved his land, with reference to the road as it was originally laid, and as used by the public. His premises, generally speaking, were easily accessible from the road at all points, and he had provided convenient crossings and gates, such as were reasonably adapted to the proper use of his land.

After the enactment of the statute creating a state highway commission, and providing for the selection and improvement of systems of county roads, the road now under consideration was included within the system adopted for Pottawattamie County. The plan for the improvement of the road, where it passes through the plaintiff's farm, involved the making of a cut along the more elevated part of its course, and in front of the farm buildings, and the construction of a grade or fill across the bottom lands adjacent to the creek. The improvement has been made, and this action is brought by plaintiff, to recover damages for injury alleged to have resulted therefrom to the farm. The county and the members of its board of supervisors are impleaded as defendants.

The petition is framed in four counts, as follows:

Count 1 alleges injury to plaintiff's premises, by so widening the road as to encroach upon and appropriate a part of plaintiff's land to public use, without compensation.

Count 2 alleges, first, that the cuts in the road were excavated so near the line as to destroy or weaken the

lateral support of the soil of plaintiff's land; and second, that the fills were so broadened, or so constructed, as to cover and destroy the plaintiff's fences, and take his property for public use, without compensation.

Count 3 alleges that the improvement is so made as to leave a cut 4 to 5 feet in depth, in front of the gate affording access to one of his fields; also, another, of like depth, in front of the only gate and entrance to another of his fields; and that his entrance to still another field has been destroyed, by construction of a grade or fill immediately in front thereof; and that, between his house and a portion of his buildings on one side of the road, and his barn and other buildings, and his well, supplying water to all his buildings, on the other side, a great cut, with perpendicular sides from 6 to 12 feet deep, has been made, thereby absolutely destroying all means of convenient passage between said buildings and improvements.

Count 4 alleges interference with and diversion of the flow of surface water, to the injury of plaintiff's land, and further complains that, by substituting a culvert of insufficient capacity for the bridge over Graybill Creek, the flow of water through the creek is obstructed, causing the lower lands to be flooded.

On all these various counts, damages are claimed, to the amount of \$8,000.

The defendants demurred to the petition and to each of the several claims therein stated, on the ground that the county and its officers constitute a governmental agency; that, in improving the road, they were engaged in the performance of a statutory duty; and that, in the absence of any statute imposing liability upon them for the manner in which that duty was performed, an action will not lie against them for resulting injury to the plaintiff's property.

The demurrer was overruled as to the items of claim made for encroachments upon plaintiff's land outside of the

road limits, but sustained as to all other items of alleged injury for which a recovery of damages is sought.

The plaintiff declining to amend his petition, and electing to stand thereon, the court entered judgment, dismissing the several claims to which the demurrer was sustained, and taxed the costs made thereon to plaintiff, who appeals.

It is to be borne in mind at the outset that the damages sought are not those which arise from the original location and establishment of a public road. The petition alleges

that this road had been established and in actual public use for more than 40 years before the occurrence of the matters of which complaint is made. It is to be pre-

sumed, therefore, that, when so located and established, the public right therein was regularly acquired by condemnation, purchase, or consent, and that the damages resulting from the taking of the land for public use were then paid or waived, or relinquished. The right so acquired by the public was not simply to travel over or upon the natural surface of the land within the limits of the road. It acquired, as well, the right to improve such way; and, in the very nature of things, this included improvement of the grades, so far as is reasonably practicable, by cuts upon the elevations and fills upon the low lands. All these things must be presumed to have been contemplated, and their effect, if any, upon the value of the land over and along which the road was laid, taken into due consideration in assessing the damages for the original taking.

This being true, it seems quite clear that, in the absence of statutory regulation, no right of action for damages will accrue to the adjacent owner from the mere fact that an improvement of the grade of an established highway has rendered the use of his land less convenient than it was before. We have, however, a statute intended to protect the landowner, to some extent, against abuse of the

2. HIGHWAYS :
condemnation
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right of road improvement. Code Section 1556 provides, among other things, that the officer having in charge work of this character shall not "destroy or injure the ingress or egress to any property, or turn the natural drainage of the surface water to the injury of adjoining owners." This, we have held, is not to be construed as prohibiting all changes which may cause some inconvenience in the use of adjacent property, because such strict rule would often make improvement of the highway practically impossible, even when greatly needed, and the general public would suffer accordingly.

"The law was designed to protect the owner in the use and enjoyment of his property, and to prevent interference on the part of road supervisors; but it was not intended to prevent necessary improvements in the highways, when they can be made without material injury to adjacent property, even though some inconvenience might result to the owners of such property." *Randall v. Christiansen*, 76 Iowa 169.

In the case of *Haydon v. Whitaker*, 156 Iowa 87, it was held that, under this statute, injunction would lie against a road supervisor to restrain him from "unreasonably and unnecessarily interfering" with the landowner's access to his premises; but, thus far, none of our decided cases have involved the question whether an action at law to recover damages is maintainable against the county or the road officers for damages on account of such interference. Whether, even in the absence of a statute of this kind, the adjacent landowner has not a right of access to his premises from the public road, of which he cannot be lawfully deprived without compensation or without his consent, is a question we shall not here attempt to discuss. It is enough, for the present, that the right to be protected in such access has been recognized by the legislature. The

remedy for an infringement of that right will be considered later.

The familiar precedents found in our own decisions for recovery of damages against cities and towns, occasioned by changes of a grade once duly established, have their foundation in statutes providing therefor. Code Section 785; *Talcott Bros. v. City of Des Moines*, 134 Iowa 113.

Whether damages are recoverable for injuries which are merely consequential upon the exercise of the public right to improve a public way, is a subject upon which there is diversity of opinion. Were the question one of first impression in this state, the writer of this opinion would strongly incline to the view that, where the exercise of such public right naturally and necessarily operates to the material permanent injury of the adjacent land, it should be treated as being, to all intents and purposes, a "taking of property for public use," compensation for which is contemplated by the constitutional guaranty. But the question is not an open one in this jurisdiction. It was more or less directly passed upon in *Creal v. City of Keokuk*, 4 G. Greene 47; *Russell v. City of Burlington*, 30 Iowa 262; *Slatten v. Des Moines V. R. Co.*, 29 Iowa 148; and other cases, in which the rule is accepted as settled. It was more fully considered and discussed in *Talcott Bros. v. City of Des Moines*, 134 Iowa 113, and the view expressed in the *Creal* case, again affirmed by a majority of the court, holding, in express terms, that the liability of the state or municipality for injury to land by the improvement of a public way does not extend to or include indirect or purely consequential damages, but is confined, in judicial application, to the case of property actually taken and appropriated. That this rule works hardship in some cases may be easily believed; and, assuming the truth of the matters pleaded in the petition, this case is an illustrative example of that fact. But roads are not provided for the sole bene-

fit of the property over or along which they are laid. They are for the use of the general public, and the law providing for their improvement has in view their general public convenience and usefulness. When first established, under pioneer conditions, they are given comparatively slight attention; but, with the increase of population and traffic, there comes a correspondingly increased demand and necessity for road improvements. The necessity and propriety of the improvements, their kind, character, and extent, and the matter of their execution or construction, are confided to such boards, officers, or agencies as the legislature has provided for that purpose; and, in the absence of any provision for the review of their action upon appeal or otherwise, their finding and decision are final, so long, at least, as they act in good faith, and within the scope of the authority conferred upon them. In the discharge of these duties, they are the arms or agencies of the state, and are clothed with the exemption which the state itself enjoys against claims for the damages, if any, resulting to the individual citizen or property owner. *Snethen v. Harrison County*, 172 Iowa 81. And this rule is held to include claims for damages against the county, its officers and agents, even for injuries occasioned by the negligent manner in which those duties are performed. *Snethen v. Harrison County*, 172 Iowa 81.

The argument most forcibly and plausibly urged upon our attention is that plaintiff has a vested right of passage between his premises and the highway; that this right is property, and, as such, is protected by the constitutional guaranty against subjection to public use without compensation. In support of this proposition, counsel cite and rely largely upon *Dallas County v. Dillard*, 156 Ala. 354 (47 So. 135, 18 L. R. A. [N. S.] 884), as being directly in point. An examination of the case reveals that it was decided under a provision of the Alabama Constitution by which "mu-

municipal and other corporations and individuals invested with the privilege of taking property for public use, shall make just compensation * * * for the property taken, *injured or destroyed* by the construction or enlargement of its works, highways, or improvements, which compensation shall be paid before such taking, injury or destruction." Constitution Alabama (1901) Section 235.

The Constitution of Iowa provides only that "private property shall not be *taken* for public use without just compensation." Constitution Iowa, Article 1, Section 18. It needs but this statement to demonstrate the inapplicability of the cited precedent to the case at bar. Had we a constitution like that which controlled the action of the Alabama court, we should have no difficulty in coming to a like conclusion. The courts of Ohio and Kentucky are in line with the Alabama case; but, in other jurisdictions where the constitutional guaranty is limited to the "taking" of property for public use, the limitation of liability is for that which is "taken," and does not include damages for injury which is consequential only. Discussing this question, as applied to street improvements which interfere with access to adjacent property, it has been said that:

"An original purchaser of an abutting lot, and all subsequent purchasers, take with the implied understanding, or as tacitly agreeing, that the public shall have the right to thus improve or alter the street so far as may be necessary for its use as a street, and that they can sustain no claim for damages resulting to their lots or property from the impairment or destruction of such incidental rights, as a mere consequence from the use or improvement of the streets as highways. Ohio and Kentucky alone, of all the courts of this country, have denied such subordination of these incidental rights to the highway rights of the public. The doctrine of the courts of other states and of the United States is that, so long as there is no application of the

street to purposes other than those of a highway, or no diversion of it from street purposes, any changes of grade made lawfully and in the exercise of good faith, or not maliciously, or for the purpose of doing injury to the abutter, is not within the constitutional inhibition against taking property without compensation, nor the basis for an action for damages." *Selden v. City of Jacksonville*, 28 Fla. 558 (14 L. R. A. 370).

See, also, Lewis on Eminent Domain, Section 96. Many other authorities to the same general effect could be cited, but the rule is too firmly established by our own precedents to require or justify the prolonging of this opinion for their consideration.

We are united in the opinion that, without further legislation on the subject, the owner of land adjacent to an improved highway cannot maintain an action against the county or its officers or agents for the recovery of consequent damages for injury resulting to his property by reason of such improvement.

It follows that the ruling upon the demurrer to the petition must be affirmed. We hold, however, that, under the statute before referred to, plaintiff is not without right to equitable relief, if it shall appear that the grading, cutting, or filling of the road has the effect to destroy or materially impair the means of egress and ingress which are essential to the convenient use and enjoyment of his property; and, as the cause must be remanded for further proceedings upon those items of plaintiff's claim the demurrer to which was overruled, the trial court is directed to permit him, if he so elects, to amend his petition by asking for appropriate relief which shall preserve and enforce his statutory right to convenient passage between the highway and his lands bordering thereon, in such manner as will be reasonably sufficient for the purposes of ingress and egress.

It is, therefore, ordered that the ruling of the trial

court upon the demurrer to the petition be affirmed, and the cause remanded for further proceedings in harmony with this opinion.—*Affirmed and remanded.*

LADD, GAYNOR, and STEVENS, JJ., concur.

SECURITY SAVINGS BANK, Appellant, v. J. H. WORKMAN et al., Appellees.

CORPORATIONS: *Unilateral Agreement to Repurchase Stock.* The unilateral agreement of a corporation to repurchase, under named terms and conditions, stock which it has sold, does not ripen into an enforceable agreement in the hands of an assignee *until the purchaser in some manner manifests an election to avail himself of such agreement.*

Appeal from Dallas District Court.—GEORGE B. LYNCH, Judge.

FEBRUARY 23, 1920.

SUIT on a promissory note resulted in judgment against the defendant Workman and foreclosure of lien on collateral security, as prayed, and the dismissal thereof as against the Globe Manufacturing Company. The plaintiff appeals.—*Affirmed.*

S. Trevarthen and White & Clarke, for appellant.

Dugan & Dugan, for appellees.

LADD, J.—An employee of the Globe Manufacturing Company, a corporation engaged in business, entered into a contract with the said company, purchasing 1,000 shares of stock, of par value of \$1.00 each, and executed his promissory note to it therefor in the sum of \$1,000. This stock was retained by the company as collateral security, in pursuance of said agreement, which provided that:

"In consideration of J. H. Workman purchasing one thousand dollars (\$1,000) worth of stock in the Globe Mfg. Co. said company agrees to take his note for same for one year drawing 7 per cent interest, holding said stock as collateral security, with the understanding that the dividends paid by the Globe Mfg. Co. on said stock shall apply first toward paying the interest on said note and any balance remaining over after paying said interest shall be applied on the principal of said note.

"It is further understood that in the event that J. H. Workman ceases to be employed by the Globe Mfg. Co. of Perry, Iowa, either because of his voluntary resignation or because of being discharged by said company, that said company agrees to purchase back from him his said one thousand dollars (\$1,000) worth of stock and pay him for same the same amount that the stock has cost him. In the event that he has a bona-fide offer from outside parties which amounts to more than what he has actually paid for the stock said company is to have the first opportunity of purchasing from him said stock and paying him for same on the same basis as what he is offered from other parties. At all times and in all events in case he desired to sell this stock this company is to have the first opportunity of purchasing same."

The note was payable to the company, and, shortly after executed, was negotiated by the company to the Citizens Trust & Savings Bank. With it were delivered the certificate of stock and agreement. The note was renewed by executing another for like amount to the bank, and it, with accompanying papers, was thereafter transferred to plaintiff. In this suit, judgment was sought against both defendants, the establishment of a lien for the amount owed for the stock, an order for its sale, and the application of the proceeds on the judgment. The relief so asked was granted, and plaintiff's right thereto is not questioned.

The only complaint is of the court's ruling in dismissing the petition as to the Globe Manufacturing Company. There was no showing that plaintiff was misled to its disadvantage by the payment of interest on the note by the president of the company, or by his promises to take care of the note, or that there was any consideration for such promise; and this feature of the cause requires no further attention. The company's contentions are that the evidence does not show that the contract was assigned to either bank; that, as Workman ceased to be in its employment in November, 1916, and never elected to sell the stock to the company, he is deemed to have elected to retain the same, and to have waived the right to be paid back the amount the stock cost him; and that plaintiff, in seeking relief against Workman, elected to waive all claim against the Globe Manufacturing Company. The Globe Manufacturing Company undertook "to purchase back from him (Workman) his said one thousand dollars (\$1,000) worth of stock, and pay him the same amount that the stock has cost him," in event of his being discharged; but Workman did not undertake to sell at that price or any other, nor at that time. Any implication to the contrary is obviated by the clauses following, giving the company the opportunity to purchase by paying the amount of a bona-fide offer of more than the amount paid by another, and granting the company at all times the first opportunity to buy. Plainly enough, the company binds itself to purchase, in event of the discharge or resignation of Workman; but whether the latter shall sell is left optional with him, -and, until he shall elect to avail himself of the company's agreement to buy, he retains the stock, subject to the lien created by the contract. In so far as appears, Workman, though having ceased to work for the company, has not indicated any purpose of availing himself of its undertaking to purchase, and still retains the title, as stated. In

other words, the agreement, in so far as the sale of the stock is concerned, amounted to no more than an option to sell; and, until Workman elected to sell, the proposed purchase price did not mature, nor even assume the dignity of an indebtedness. Ordinarily, in such a situation, the stock must be tendered as a condition precedent to the recovery of the purchase price. *Hamilton v. Finnegan*, 117 Iowa 623; *Doughty v. Law*, 178 Iowa 840; *Olsen v. Northern Steamship Co.*, 70 Wash. 493 (127 Pac. 112); *New Haven Trust Co. v. Gaffney*, 73 Conn. 480 (47 Atl. 760); *Cabot v. Kent*, 20 R. I. 197 (37 Atl. 945); *Morris v. Veach & Co.*, 111 Ga. 435 (36 S. E. 753). But Workman did not have possession of the stock, and therefore could not tender it, as it had been hypothecated as security with the proposed purchaser, and by it transferred, with the evidence of the indebtedness; but this did not obviate the necessity of manifesting his election in some manner to part with title, according to conditions specified in the agreement, and accept the purchase price thereunder. An option does not ripen into a contract until accepted; and, until Workman had indicated his acceptance of the Globe Manufacturing Company's proposition to buy, he retained title to the certificate of stock, and the company did not become liable for the amount the stock cost him. The cause was rightly decided, and the judgment is—*Affirmed*.

WEAVER, C. J., GAYNOR and STEVENS, JJ., concur.

STATE OF IOWA, Appellee, v. LEON CARTWRIGHT, Appellant.

TRIAL: Objections—Necessity for Evidence of Fact. An objection
1 based upon an alleged fact will be disregarded, when the record
is barren of any evidence of such fact.

CRIMINAL LAW: Alibi—Cautionary Instructions. Instructions to
2 the effect that an alibi is easily manufactured, and that the

proofs pertaining thereto should be scanned with care and caution, are proper.

CRIMINAL LAW: Accomplice—Insufficient Evidence. Evidence 3 held insufficient to show that the witness in question was an accomplice; and, therefore, no occasion arose for instructing in reference thereto.

Appeal from Boone District Court.—R. M. WRIGHT, Judge.

NOVEMBER 15, 1919.

REHEARING DENIED FEBRUARY 23, 1920.

THE defendant was indicted upon charge of maliciously threatening to injure the property of one Anna Carson, with intent thereby to extort money from the said Anna Carson, against her will. To the charge, the defendant pleaded "not guilty," and, upon trial to a jury, was convicted. From the judgment entered on the verdict, he appeals.—*Affirmed.*

W. W. Goodykoontz, for appellant.

H. M. Havner, Attorney General, F. C. Davidson, Assistant Attorney General, and Charles W. Lyon, for appellee.

WEAVER, J.—The points made by counsel for a reversal of the judgment of conviction are as follows:

I. The record shows that the trial of the defendant was begun on December 5, 1918. On that day, a jury was impaneled and, after the introduction of the State's evidence in chief, and after a beginning had been made upon the testimony for the defendant, the court was adjourned to December 16, 1918, because of sickness in the family of a juror. On the date last named, a further adjournment was made to December 30, 1918, because of the absence of jurors. On December 30, 1918, the defendant ob-

1. TRIAL: objections: necessity for evidence of fact.

jected to proceeding further with the trial, because, after the last adjournment of court, and since the trial began, one of the members of the trial jury had been appointed administrator of the estate of one Elliot, deceased, and the firm of which J. R. Whitaker, assistant attorney for the State, was a member, was representing said administrator in that proceeding. Mr. Whitaker, being present in person, stated to the court that he had no personal knowledge of the facts of the matter referred to. The objection was thereupon overruled, and appellant assigns error thereon.

There are several good reasons why this exception cannot prevail; and of these we need only suggest one, which is that, so far as the record shows, the alleged fact upon which the objection was based, does not appear to have been admitted, or any evidence thereof submitted to the court.

II. Objection is also raised to several paragraphs of the court's charge to the jury, because they are obscure, if not ambiguous, and do not clearly and distinctly present to the jurors the simple essential questions upon which they were required to pass.

As to most of these paragraphs, counsel do not claim, nor do we think it can fairly be said, that, when read with an intelligent desire to ascertain their meaning and effect, they, or any of them, state an erroneous proposition of law. These instructions have special reference to what is meant by the words "intent," "motive," and "malice," and, if open to any objection at all, it is not because they are incorrect, but because the attempt to define and illuminate the meaning of simple words of common, everyday use tends oftener to confuse than to help the mind unaccustomed to critical definition of terms. We have read the court's charge in this respect with much care, and we find therein no prejudicial error.

III. The court gave an instruction upon the defense of alibi; and in so doing, made use of the language found

in some of our cases, cautioning the jury that it is a defense "easily manufactured," and that the proofs should be "scanned with care and caution." That this cautionary instruction may properly be given, has been affirmed by this court in several cases. *State v. Whitbeck*, 145 Iowa 29, 41; *State v. Worthen*, 124 Iowa 408. The writer of this opinion is convinced, however, that the rule is a vicious one, and ought to be displaced by one more in accord with enlightened justice. With such an instruction, the defense of alibi, though supported by an array of witnesses of the highest character, is sent to the jury defaced with the stigma of judicial suspicion, which is quite sure to rob it of all value for him who offers it. Such, however, is not the view of the court; and the exception to the charge in this respect must be overruled.

IV. Counsel argue that the State's case rests upon the testimony of an accomplice, who is not corroborated, as required by law. This question does not seem to have been raised or ruled upon in the court below, and

2. CRIMINAL LAW: alibi; cautionary instructions. does not, as we view it, fairly arise in this case.

There appears to be no evidence which tends to show that the boy Johnson, to whom reference is made by counsel, was a confederate or accomplice in the alleged crime. The facts, so far as shown, are that the threatening letter was first seen tacked to a door of Anna Carson's house. In it was a warning to her to enclose \$800 in a bundle, and leave it by a post at a certain corner of her lot before 11 o'clock of the following Saturday night. Mrs. Carson took the letter to an officer, and it was planned to have her make up a dummy package of paper, and leave it at the designated place, while a watch was set for developments. Soon after 11 o'clock of Saturday night, the watchers saw Voyle Johnson, a boy of 13 years of age,

approach the corner and pick up the package, and at once arrested him. He said to his captors, and testified on the trial, that, on the evening in question, he met the appellant on the streets, and appellant arranged with him first to go past the designated corner, and see if there was a package there, and, if so, to report to appellant. This he did, and appellant then wished him to get the package, and directed him how to approach the place; and it was while carrying out these instructions that he was arrested.

There is no evidence that the boy had any connection with the writing or sending of the letter, or had any knowledge or notice of what appellant expected to find in it. On this showing, there seems to be no sufficient ground for treating the young witness as an accomplice, or for applying the rule as to the testimony of accomplices to the case made by the State.

V. Aside from the question raised as to the testimony of an accomplice, it is not argued that the verdict of guilty is not supported by the evidence. Nor, indeed, can it be. If the jury believed the State's witnesses, a conviction was inevitable.

That a man of average common sense, who has maintained a fair reputation among his neighbors for integrity of character, should have conceived and attempted to carry out such a harebrained and preposterous criminal enterprise, hoping to elude detection and punishment, is almost incredible; and yet the history of crime is replete with examples of like folly.

We find nothing in the record upon which we are authorized to disturb the verdict, and the judgment appealed from is—*Affirmed*.

LADD, C. J., GAYNOR and STEVENS, JJ., concur.

B. F. STURTEVANT COMPANY, Appellee, v. LEMARS GAS COMPANY, Appellant.

SALES: Implied Warranty—Reasonable Fitness. An implied war-

- 1 ranty of *reasonable fitness* accompanies the purchase of an un-inspected article by a buyer who expressly makes known to the vendor the use to which the article will be put, and the *conditions* under which it will be operated, and who relies on the vendor's skill and judgment.

SALES: Divisibility of Contract. A contract for the purchase of

- 2 two articles, separately priced, and intended for separate and independent use, is *divisible*, even though both articles were delivered together, under one acceptance, and at an aggregate price.

SALES: Election of Remedies—Rescission (?) or Damages (?) A

- 3 buyer may rescind for breach of warranty, or may retain the article and sue for damages consequent on the breach.

Appeal from Plymouth District Court.—C. C. BRADLEY,
Judge.

FEBRUARY 23, 1920.

ACTION on account for merchandise sold and delivered by plaintiff to defendant. Defendant pleaded rescission of the contract as to a part of the machinery, and claimed damages on account of defects in a part thereof. There was a directed verdict for plaintiff, and defendant appeals.
—*Reversed.*

Nelson Miller, for appellant.

McDuffie & Keenan and *J. U. Sammis*, for appellee.

STEVENS, J.—I. Plaintiff, a corporation, manufactures and sells certain kinds of machinery, used in artificial gas plants. The defendant corporation owns and operates a gas plant at LeMars, Iowa. Plaintiff alleged in his petition that, on or about September 28, 1915, it sold and delivered to the defendant, at LeMars, Iowa, "One No. 1 steel

1. **SALES: im-**
plied warranty:
reasonable fit-
ness.

pressure blower, with steel plate sub-base and motor, 110 volts, 60 cycles, right-hand up-blast discharge, at the agreed price of \$91; also, one No. 4 special extra heavy gas blower and motor, 110 volts, 60 blower and motor, to be repaired by plaintiff, and cycles, at the agreed price of \$380, and amounting in the aggregate to the sum of \$471;" and that payment has been refused by defendant.

For answer, defendant admitted the purchase and delivery of the machinery described, but avers that the No. 4 gas blower and motor were purchased for use in its gas plant; that, before ordering same, defendant fully advised plaintiff of the kind of machinery required, the conditions under which it would be operated, and the purpose for which it was to be used; that plaintiff manufactured the blowers and motors and represented that they had expert knowledge of the same, that the machinery delivered would do the work for which it was desired, and that it was suitable and well adapted thereto; but that, "when said machinery was delivered, and the operation of the same began, without any fault or neglect of the defendants the said machinery utterly failed to do said work; that it could not sustain an even pressure for sufficient length of time, would vibrate and shake and get out of repair, so as to make the operation of the same impractical; that it was not reasonably fit or adapted to do said work, or to do the work for which it was built; that said motor and blower in operation would shake and vibrate so that it tore itself to pieces; that the coupling or connecting parts between the motor part and the blower part of said machine would go to pieces, and could not be kept intact for more than a short period at a time, necessitating shutdowns for repairs; that it did not run smoothly and evenly, but sometimes would run at a high speed, and then die down to almost no speed at all, and barely keep itself in operation; that, through such defective and intermittent operation, it could

not and did not sustain or maintain a pressure on defendants' generator for which it was purchased; that said machinery could not be used by the defendants, because of said defects in operation, and they were compelled to procure other machinery to do the work for which it was ordered."

Defendant further alleged that, after requesting and demanding that plaintiffs put the No. 4 blower and motor referred to in petition in a condition to do the work required, and their refusal to do so, it rescinded the contract, and returned same to plaintiffs.

In a separate count of plaintiff's answer, and by way of counterclaim, it alleged that, on about April 6, 1914, it purchased a No. 4 turbine engine and gas blower of plaintiff, at an agreed price of \$385; that, before receiving same, defendants informed plaintiff fully of the purpose for which same was wanted, the work required, and the conditions under which it would be operated; that they were a public service corporation, engaged in selling gas for heating, lighting, and power purposes; that they consulted with plaintiffs, and were advised thereby that said machinery was suitable to do the work required; that it would run smoothly and evenly, and was well adapted to the work for which it was built and intended: but defendant avers that it did not run smoothly and evenly; that it failed to do the work for which it was purchased; that it would shake, vibrate, and pound so fiercely that it continually tore itself to pieces, getting out of repair, and requiring frequent shutdowns on account thereof; that the same wholly failed to do the work for which it was purchased, without fault or neglect on the part of the defendants; that it was not reasonably fit or adapted to the work for which it was intended; that defendant frequently requested plaintiff to place same in repair, which it failed to do; that the defects in said machinery were concealed, and

not known to defendant until about four months after it was installed, when it was manifested by the manner of its operation. It therefore asks judgment for damages.

As alleged in defendant's answer, the No. 4 blower and motor therein described were received by defendant on December 31, 1915, and returned in March, 1916. The No. 1 blower and motor proved satisfactory, and were retained by defendant.

For reply to the allegations of defendant's answer, plaintiff admitted the sale and delivery of the turbine engine and blower, and that it was paid \$385 therefor. They allege that same was improperly and unskillfully installed and operated by defendant; that defendant has retained said machinery without complaint, and has thereby waived its claim for damages, and is estopped to plead or prove any of the allegations of its counterclaim; that the No. 4 gas blower and motor last purchased were improperly and unskillfully installed, upon an insufficient foundation; that defendant negligently and wrongfully altered parts of the machinery, and unskillfully handled and operated said machine; and that, if it failed to work, it was due to the negligence, unskillfulness, and incompetency of defendant, and to no defect in the machinery. At the conclusion of plaintiff's evidence, a motion was offered by plaintiff for a directed verdict, which was sustained.

The principal points made by plaintiff in its motion, and in argument in this court, are as follows: (a) That all of said machinery was sold and delivered without warranty, express or implied; (b) that the evidence offered wholly failed to sustain the allegations of defendant's answer; (c) that the No. 4 motor and blower were not defective, and were reasonably suitable and fit, when properly operated, for the purpose intended; (d) that the contract for the purchase of the No. 1 steel pressure blower and motor and the No. 4 blower and motor was entire and indivisible;

that only a portion of the machinery has been returned; and that defendant has not been placed *in statu quo*, and no rescission of the contract is, therefore, shown; (e) that defendant retained the machinery referred to in defendant's counterclaim, without offer to make return thereof, and without complaint, since it was delivered, and is estopped to claim damages on account thereof; and that the evidence wholly fails to sustain the counterclaim.

The contract for the purchase of all the machinery in question is made up of various letters written by the respective parties hereto, and covering a long period of time. On account of the number and extent thereof, and deeming it unnecessary to a proper decision of the only question presented for review, we refrain from setting out this correspondence. It appears, however, from a careful reading thereof, that the order for each separate unit was forwarded, and finally accepted by plaintiff, after being fully advised of the use defendant desired to make thereof, the conditions under which it would be operated, and after the submission by plaintiff of drawings and plans, illustrating the machinery, and recommendations as to its adaptability for the purpose intended. Defendant seems to have carefully explained working conditions, and sought and received the counsel and advice of plaintiffs as to the kind of machinery required. The machinery delivered was selected and recommended by plaintiff, and purchased by defendant without previous opportunity for inspection. What constitutes an implied warranty, and when same will arise, has frequently been the subject of discussion and decision by this court. The doctrine is well stated in *American P. P. Co. v. American P. A. Co.*, 172 Iowa 139, at 152, as follows:

"The distinction between the cases in which a warranty is implied and where it is not implied is that, in one case, a person buys a distinct thing, an exact article, and gets the thing he bargained for. He cannot complain that it

does not accomplish the purposes for which he purchased it, although he communicated that purpose to the seller. In such cases, he takes his own risk as to the fitness of the thing for the intended purpose, and no warranty is implied. This rests upon the thought that no one can complain of another, or charge him with fault, who gives to him the exact thing which he bargained to give, although it is not fit for the purposes for which the purchaser bought it. The other class of cases is where one buys an article, to be used for a certain purpose, and the seller undertakes to furnish him the article required. There is, in such a case, an implied warranty that it is fit for the purposes for which it is bought. The rule is laid down generally that, where a known, described, and definite article is ordered of a manufacturer, although it is said to be required by the purchaser for a particular purpose, still, if the known, defined, and described thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer. The distinction is between the manufacture and supply of an article to satisfy a required purpose, and the manufacture or supply of a specified, described, and defined article. In one case, there is an implied warranty; and in the other, there is none."

See, also, *Blackmore v. Fairbanks, Morse & Co.*, 79 Iowa 282; *Davis & Sons v. Sweeney*, 75 Iowa 45; *Checkerowder Co. v. Bradley & Co.*, 105 Iowa 537; *Parsons B. C. & S. F. Co. v. Malvinger*, 122 Iowa 703; *Heath v. Albrook*, 123 Iowa 559; *Conkling v. Standard Oil Co.*, 138 Iowa 596; *Loatercamp v. Lininger Imp. Co.*, 147 Iowa 29; *Pew Co. v. Karley & Titsenor*, 154 Iowa 559; *Pew Co. v. Karley & Titsenor*, 168 Iowa 170.

We think that, from the facts shown, a warranty may be implied that the machinery was suitable and reasonably fit for the purpose intended. Evidence offered on behalf of defendant tended, to some extent, to show that none of

the machinery, except the small motor and blower, which are not complained of, was reasonably fit or suitable for the purpose intended. Whether its failure to do the work was due to defects in the machinery or to the unskillfulness and incompetency of defendants in the installation and operation thereof, is a question with which we have nothing to do. We have only to determine whether, upon the record made, the court erred in sustaining plaintiff's motion for a directed verdict.

II. But plaintiff also contends that the contract for the machinery described in its petition is entire and indivisible; that the order therefor was accepted in the same letter, and the machinery delivered and received by defendant at the same time; and that, by failing to return all of the machinery, plaintiff has not been placed *in statu quo*, and defendant cannot, therefore, rely upon a rescission of the contract. It is not claimed by appellant that the No. 1 blower and motor, which were not returned, were defective, or not adaptable or fit for the use intended. The question is, ordinarily, largely a matter of intention. The units were to be used separately and independently; and it appears from the correspondence between the parties that the units were separately priced, and that the delivery thereof, together, was not for the purpose of carrying out any part of the agreement or contemplated purpose of the parties. Plaintiff, in its petition, sets out the separate, agreed value of the respective units, and the only place in the correspondence in which the aggregate price is mentioned, is in the letter accepting the order. The amount therein named is the sum of the respective prices previously quoted for the two units.

The only basis of plaintiff's claim that the contract was entire and inseparable is that the final acceptance of the two orders was made at the time, and fixed an aggregate

2. SALES: divisibility of contract.

price, and that the units were delivered together. It has often been held that a contract is not entire and indivisible because embraced in one instrument (*Straus v. Yeager*, 48 Ind. App. 448 [93 N. E. 877]; *Edgerton v. Power*, 18 Mont. 350 [45 Pac. 204]), and that it is not necessarily severable because embraced in more than one instrument. *Sprigg's Admr. v. Rutland R. Co.*, 77 Vt. 347 (69 Atl. 143); *Waldron v. Canadian Pac. R. Co.*, 22 Wash. 253 (60 Pac. 653). Referring to this question, the court, in *Pacific Timber Co. v. Iowa W. & P. Co.*, 135 Iowa 308, said:

"As a general rule, it may be said that a contract is entire, when, by its terms, nature, and purpose, it contemplates and intends that each and all of its parts and the consideration shall be common, each to the other, and 'interdependent.' On the other hand, it is the general rule that a severable contract is one in its nature and purpose susceptible of division and apportionment. The question whether a given contract is entire or separable is very largely one of intention, which intention is to be determined from the language the parties have used, and the subject-matter of the agreement. The divisibility of the subject-matter or the consideration is not necessarily conclusive, though of aid, in arriving at the intention."

See, also, *Murphy v. Williamson*, 180 Iowa 291; *United States Tr. Co. v. Incorporated Town of Guthrie Center*, 181 Iowa 992; *Quarton v. American Law Book Co.*, 143 Iowa 517; *Bamberger Bros. v. Burrows*, 145 Iowa 441; *Sprigg's Admr. v. Rutland R. Co.*, supra; *Straus v. Yeager*, supra; *Stearns Salt & Lbr. Co. v. Dennis Lbr. Co.*, 188 Mich. 700 (2 A. L. R. 638, and note).

The witnesses on behalf of defendant went into considerable detail in describing the machinery referred to in plaintiff's petition and defendant's counterclaim, and in pointing out the defects therein, as well as its inadaptability for the purpose intended. It will serve no good purpose

for the court to review this evidence, further than to say that, in our opinion, it was sufficient to make out a prima-facie case for defendant, and entitled it to have the issues submitted to the jury. It is true that some considerable time elapsed before defendant returned the blower and motor; but, during the intervening period, there was correspondence between the parties, and a representative of plaintiff, at the demand of defendant, visited LeMars, and undertook to operate the machinery and place it in condition to do the work required. We cannot say, as a matter of law, that defendant did not return the machine within a reasonable time.

The contract was divisible, and defendant could not properly rescind the same, so far as it applied to the smaller machine, nor was it estopped by anything appearing in the

record to set up a claim for damages on account of the alleged defects in the turbine engine and blower purchased in 1914. It had an election of remedies. It could either return the machinery and recover the purchase price, if paid, or it could retain the same and sue for damages. If elected to do the latter. Without expressing an opinion upon the merits of defendant's claims, we think the issues should have been submitted to the jury. For this reason, the judgment of the court below is—*Reversed*.

WEAVER, C. J., LADD and GAYNOR, JJ., concur.

CITY BANK OF MITCHELLVILLE et al., Appellees, v. L. O. ALCORN et al., Appellants.

TRIAL: Instructions—Combining Defense and Avoidance. Conflict
1 does not necessarily result from presenting defendant's defense and plaintiff's avoidance thereof in one and the same instruction.

ESTOPPEL: Failure to Show Prejudice. Pleading estoppel and
2 proving all elements thereof except *prejudice* avails nothing.
So held where plaintiff pleaded that, owing to reliance on a
guaranty, he had failed to institute bankruptcy proceedings
against the principal debtor, but failed to prove that he would
have realized anything, had he instituted such proceedings.

APPEAL AND ERROR: Scope of Review—Reversal in Any Event.

3 Principle recognized that, when there must be a reversal in
any event, the court will not express an opinion on an assign-
ment on which the court may not be able to agree.

APPEAL AND ERROR: Order of Argument—Abuse of Discretion.

4 Error in regard to the order of arguments will not effect a re-
versal, in the absence of a showing of abuse of discretion and
consequent prejudice.

TRIAL: Argument—Opening and Closing. Defendant has the right

5 to open and close the argument, when defendant (1) confesses
and (2) pleads affirmative avoidance, and plaintiff (1) denies
and (2) pleads estoppel.

Appeal from Polk District Court.—THOMAS J. GUTHRIE,
Judge.

MARCH 10, 1920.

EMMA Alcorn, in writing, guaranteed a promissory
note made by L. O. Alcorn. She defends that her guarantee
was not to be effective until it was approved by L. O. Al-
corn, and that no such approval was had. The plaintiff
urges that Emma is estopped to make this defense. Judg-
ment went against the guarantor, and she appeals.—*Re-*
versed.

Miles & Steele, Clark, Byers & Hutchinson, H. N. Han-
sen, and Roe P. Thompson, for appellant.

Stipp, Perry, Bannister & Starzinger, for appellees.

SALINGER, J.—I. The complaint that the court refused
to give Instruction 1, offered by defendants, is sufficiently
answered by pointing out that the very words of said of-

ferred instruction may be found in part of Instruction 7, given by the court.

II. The first part of Instruction 7 charges that Emma Alcorn should have the verdict, if she has established her claim that her guaranty was not to be effective until it had the approval of L. O. Alcorn. It is complained that Instruction 7 is in conflict with itself, because it is further charged therein that, if plaintiff has proven the estoppel alleged by it, it should have the verdict. We can see no conflict. In effect, the instruction as a whole is that, if defendant establishes her claim, she must have the verdict, unless plaintiff has established an avoidance to that claim. It amounts to telling the jury that proving the affirmative defense makes a prima-facie case for defendant, but that this case is overcome if it is found that defendant has lost the right to urge this defense.

III. The plaintiff averred that, in reliance upon the guaranty executed by Emma Alcorn, it allowed the time to lapse wherein it might have instituted bankruptcy proceedings against the principal maker of the note, L. O. Alcorn; that it would have instituted said proceedings in due time, if it had not been for such reliance, and that, therefore, Emma Alcorn is estopped to repudiate her guaranty. It is complained there is no evidence that justifies the submission of this issue. Let us assume, for the sake of the argument, that there was this reliance, and that, therefore, no bankruptcy proceedings were instituted. But does that furnish a basis for the estoppel urged? An estoppel is not favored in the law, and strict proof of all its elements is demanded. *Baldwin v. Lowe*, 22 Iowa 367; *Anfenson v. Banks*, 180 Iowa 1066. In cases other than those involving inconsistent conduct in court, there is no estoppel unless there be prejudice shown. It is not enough that the bank

1. TRIAL: instructions: combining defense and avoidance.

2. ESTOPPEL: failure to show prejudice.

was induced not to institute the bankruptcy proceedings, but there must be some evidence that something was lost by failing to institute them. If there be any evidence on the subject at all, it indicates that L. O. Alcorn was so hopelessly insolvent that the institution of bankruptcy proceedings would have gotten the bank nothing, except an opportunity to pay court costs and attorney fees. At any rate, there is absolutely no evidence that the bank would have realized anything whatever by means of such proceedings. True, it can be gathered from testimony of Emma Alcorn that, if L. O. were given enough time, he might do something for his creditors. It may be loosely said that, if enough time be given anyone who is utterly insolvent, he may acquire property. The fact remains that, putting it at its mildest, there is no evidence that, if plaintiff had instituted the bankruptcy proceedings, that it would have been one penny better off. It follows that, though it refrained from instituting these, in reliance upon the conduct of Emma Alcorn, there is no evidence of prejudice. It follows, in turn, the court should not have submitted said *es-toppel* in that state of the evidence.

IV. The appellant asked the submission of two interrogatories, to wit:

"(1) Was it the understanding and intention of defendant Emma Alcorn that the written guarantee referred to in plaintiff's petition should be presented to L. O. Alcorn, and his approval and consent thereto secured before the same should have force and effect?"

3. **APPEAL AND
ERROR:** scope
of review: re-
versal in any
event.

"(2) Do you find that the written guaranty referred to in the petition was signed by Emma Alcorn, with the understanding and promise on the part of plaintiff's representative that same should be presented to L. O. Alcorn for his consent and approval?"

The court declined to give either, and this action is

complained of. We might not all be agreed on whether it was or was not error to refuse the submission of these interrogatories. See *King v. Chicago, R. I. & P. R. Co.*, 185 Iowa 1227. Since there must be a reversal in any event, we will follow the rule laid down in *State v. Asbury*, 172 Iowa 606, many times approved since, and not pass upon this point on this appeal.

V. Appellant asserts she had the burden of proof, and that, therefore, it was error to deny her the opening and closing of the argument. If it was error, an error in regard to the order of the arguments is not reversible, unless it appears there was an abuse of discretion in what is a mere matter of practice, and that therefrom prejudice has resulted. We do not think there was any abuse of discretion. *Farmer v. Norton*, 129 Iowa 88; *Preston v. Walker*, 26 Iowa 205, 208; *Ashworth v. Grubbs*, 47 Iowa 353; *Shaffer v. Des Moines Coal & H. Co.*, 122 Iowa 233.

In view of a retrial, we think it not amiss to add that, if the record remains the same, the defendant should be allowed the opening and closing. The signing of the note is admitted by the defendants; so is the signing of the guaranty. The defense is an affirmative one, to wit, that the guaranty was to be effective only if approved by L. O. Alcorn, and that he had failed to approve it. This the bank meets with both a denial and an affirmative allegation, urging an estoppel. We are of opinion that, since defendants made the first affirmative plea, and had the burden of proving it, the right to open and close is not taken away because this affirmative plea is denied and is met with an affirmative plea upon which the plaintiff had the burden.

4. APPEAL AND
ERROR: order
of argument:
abuse of dis-
cretion.

5. TRIAL: argu-
ment: opening
and closing.

For having submitted the issue of estoppel, the judgment below must be and is—*Reversed*.

WEAVER, C. J., EVANS and PRESTON, JJ., concur.

JOHN DEBOK, Appellee, v. T. C. DOAK, Appellant.

WATERS AND WATERCOURSES: Waste of Subterranean Percolating Waters. Injunction will lie to restrain the *unnecessary waste* of subterranean percolating waters, to the injury of a lower landowner; especially is this so where the lower proprietor needed such waters for *human* consumption. So held where the upper proprietor, who was drawing off the water through a syphon, was required to reduce the size of his pipe, and to construct tanks to hold the water for hog wallows.

Appeal from Madison District Court.—LORIN N. HAYS,
Judge.

MARCH 10, 1920.

THE plaintiff complained of an alleged injury caused him by a diversion of water on part of defendant. He prayed injunctive relief, and the relief prayed was, in part, granted. Defendant appeals.—*Affirmed*.

John A. Guiher, W. T. Guiher, and Berry & Watson, for appellant.

A. W. Wilkinson, Phil R. Wilkinson, and J. P. Steele, for appellee.

SALINGER, J.—I. In the errors relied on for reversal, defendant, appellant, asserts that he had an abundant supply of clear, cool water "flowing from his ground in his pasture for his live stock," and that the court held he was entitled to take all the water he needs for the fullest enjoyment and usefulness of his land, as land. He continues

his stock, or for any proper use in operating his farm. Express permission is given defendant to use water for freshening the water in his tanks, and to cleanse the same. The court was of opinion that, instead of permitting water to flow on the ground, and run down the branch or stand along the branch for the purpose of furnishing hogs with water and wallows, defendant should construct a tank or other receptacle for such water, and thus create his pools or wallows and drinking supply without permitting the water to flow over the ground, as it is now flowing; in one word, that drinking water for hogs and for wallows is to be obtained by some means that will take the overflow from the horse and stock tank on without its being needlessly absorbed by the soil or exhausted by evaporation. These are in the nature of findings, and, one might almost say, recommendations. What was, in strictness, the decretal order restrains defendant from permitting "the water from his syphon or tank to overflow or run upon the ground down the branch in such a manner as to be taken up by the soil and unduly evaporated, during extreme weather." And he is perpetually enjoined "from permitting the water taken from said spring by use of the syphon or otherwise from escaping from said pipes or from overflow from his tanks in such a manner as to create pools or ponds or hog wallows for his hogs upon the ground." We think we are wholly within bounds in saying, and in repeating, that it has not been made as easy as it might be to determine in just what way the action below has interfered with the defendant. In our best judgment, it is a fair analysis of that action that defendant is not to be interfered with in conducting water to the tanks used by his horses and cattle by means of a syphon, provided he puts no more water into this tank or tanks than is reasonably necessary for the use of his horses and cattle, and for freshening the water in the tank and cleaning the same; that

he is not to let the overflow from these horse and cattle tanks run along the ground, but must take such steps as are reasonably necessary to avoid the waste caused by the water running upon the ground and its evaporation—and the decree indicates what steps will be adequate.

The precise question for our determination is whether such an order as this unduly interferes with the rights of defendant.

III. Appellant contends that he has, in fact, wasted no water. Without touching, at this time, on whether such waste as the decree finds is permissible, we hold with the trial court that waste is being committed by defendant. He contends further that the water running from his tanks and over the ground flows over the land of the plaintiff, and that plaintiff may therefrom readily obtain a sufficient quantity for the use of his stock. We do not think the evidence sustains this assertion.

IV. One argument is that what the decree, in effect, accomplishes, is to relieve plaintiff from digging a well of his own, and thus obtaining his water supply; that defendant is under no obligation to construct anything that will save to the uttermost the surplus water in his own tanks—save the water running, after his horses and cattle are through with it; that, if there is to be any conserving of this water, plaintiff, as the beneficiary thereof, should provide the means of conservation. All these arguments are the premise for the ultimate claim that defendant, being the upper owner, has the right to do whatsoever he pleases with any water that runs under the surface of his own land and that of the plaintiff, and with the supply that these underground waters place into the spring, though the spring itself is on the land of the plaintiff. It may be conceded that there was a time when the law sustained this position. The question remains whether that is so still.

We are of opinion that it admits of the gravest doubt.

whether the law ever allowed the upper owner to waste water after it had reached a spring on the land of the lower owner—ever permitted him to interfere with the spring itself. See *Wheatley v. Baugh*, 25 Pa. St. 528; *Gagnon v. French Lick S. H. Co.*, 163 Ind. 687; *Pence v. Carney*, 58 W. Va. 296 (52 S. E. 702); *Willis v. City of Perry*, 92 Iowa 297; *Barclay v. Abraham*, 121 Iowa 619. But we have concluded not to rest the decision of this appeal on the fact that the underground waters in dispute actually reached the spring.

It cannot well be disputed that the law at no time permitted the upper landowner to waste underground waters, if they ran in a well-defined stream. See *Southern Pac. R. Co. v. Dufour*, 95 Cal. 615 (30 Pac. 783); *Wheatley v. Baugh*, 25 Pa. St. 528; *Springfield Waterworks Co. v. Jenkins*, 62 Mo. App. 74; *Barclay v. Abraham*, 121 Iowa 619. In other words, if it were clear that the supply of this spring was an underground stream, with a well-defined channel, the court could enjoin the waste of the waters in that stream, both before they reached the spring and after they reached it. But it is not clear whether the subterranean supply ran in such channel, instead of being created by percolating water, and it is presumed that the supply came from percolating waters. *Barclay v. Abraham*, 121 Iowa 619, 622. In the state of the evidence, we deem it safer ground to assume that the underground waters were percolating. It follows that the decision here must determine whether, though the supply is furnished by percolating water, the decree below is justified.

4-a

It may be assumed that, at one time, the upper landowner was at liberty to deal as he pleased with subterranean percolating waters. We hold with appellant that *Huber v. Merkel*, 117 Wis. 355 (94 N. W. 354), declares that the upper landowner may waste a supply created by such

waters, without liability, though such waste stops the flow of wells on the land of adjoining owners. The question remains whether the weight of more modern authority demands that we should follow this decision. We are willing to say that now, as ever, the chancellor should proceed cautiously in interfering with the use of water by the dominant owner. *Roath v. Driscoll*, 20 Conn. 533. But so proceeding, is not the decree sustained by the law as it stands today?

It is said in *Gagnon v. French Lick S. H. Co.*, 163 Ind. 687 (72 N. E. 849, 852), that the strong trend of the later decisions is toward a qualification of the earlier doctrine that the landowner could exercise unlimited and irresponsible control over subterranean waters on his own land, without regard to the injuries which might thereby result to the lands of other proprietors in the neighborhood; that local conditions, the purpose for which the landowner excavates or drills holes or wells on his land, the use or non-use intended to be made of the water, and other like circumstances, have come to be regarded as more or less influential in this class of cases, and have justly led to an extension of the maxim, "*sic utere tuo ut alienum non laedas*," to the rights of landowners over subterranean waters, and to some abridgment of their supposed power to injure their neighbors without benefiting themselves. In *Springfield Waterworks Co. v. Jenkins*, 62 Mo. App. 74, the existence of the older rule is recognized, but held that, despite that rule, the right to appropriate percolating waters is not absolute or unlimited; that the upper owner cannot obstruct or divert it without benefit to himself or his land, merely to injure the adjoining proprietor, who is subjecting it to beneficial use. It is ruled, in *Pence v. Carney*, 58 W. Va. 296 (52 S. E. 702), that while, if the diversion of percolating water is not wasteful, equity will not interfere, although the effect may be to temporarily decrease the supply of wa-

ter in a natural spring found on adjacent land, yet the diversion may not be wasteful, and the right to it is limited to a reasonable and beneficial use of the water, if to use it other than reasonably and for such beneficial use would deprive the adjacent and neighboring lands of the enjoyment of percolating water or natural spring water thereon.

We think *Barclay v. Abraham*, 121 Iowa 619, 621, is in line with these decisions, and holds that equity may interfere, where the upper landowner is utterly wasting water that his neighbor needs. It is true that, in the *Barclay* case, it is found the record strongly indicates that the motive was to maliciously cut off the water supply of the water proprietor. It is also true that the trial court acquitted defendant of having acted through malice. But this was held in connection with, or at least on giving consideration to, a contempt proceeding, instituted for alleged violation of the earlier decrees; and it may fairly be said that the malice which the court found absent was express malice. We think the *Barclay* case speaks of malice as that term is understood in law. There is much in the record that indicates bitter feeling lay behind the insistence of the defendant to obtain his water supply at all costs. But we will assume there was no express malice. We do find, however, that there was malice in law, and that hence the interference by the chancellor was justified, though the water supply interfered with was created by percolating waters only. In so holding, we follow the almost universal declaration of the courts that, where the diversion is malicious and detrimental to another proprietor, injunction may restrain it. See *Miller v. Black Rock S. I. Co.*, 99 Va. 747 (40 S. E. 27). That malice in law is referred to, rather than express malice, is made clear because, for instance, the diversion has been held to be actionable where the harm was caused by negligence (*Wheatley v. Baugh*, 25 Pa. St. 528 [approved in the *Barclay* case]); or is caused by reck-

lessness (*Gagnon v. French Lick S. H. Co.*, 163 Ind. 687 [72 N. E. 849]); or through indifference (*Pence v. Carney*, 58 W. Va. 296 [52 S. E. 702]). And *Stillwater Water Co. v. Farmer*, 89 Minn. 58 (93 N. W. 907), strongly indicates that the fact that waste is being committed to the injury of another will, of itself, invoke the powers of the chancery court.

4-b

In reaching our final conclusion, we have been moved in some degree by the fact that defendant demands unrestricted license, in order to supply his hogs with drink and wallowing places, while the plaintiff is, among other things, urging his needs in supplying human beings with water. The relative need and use has always had some consideration in equity. We have held that the use of water for natural purposes takes precedence over the right to use it for artificial ones. *Willis v. City of Perry*, 92 Iowa 297. It is ruled, in *Katz v. Walkinshaw*, 141 Cal. 116 (70 Pac. 663 and 74 Pac. 766), that the owner of a portion of a tract which is saturated below the surface with an abundant supply of percolating water may not remove water from wells thereon for sale, if the remainder of the tract is thereby deprived of water necessary for its profitable enjoyment by its owner; and in *Forbell v. City of New York*, 164 N. Y. 522 (58 N. E. 644), that the drainage of the land of a private owner by means of a city pumping works, which exhausts from the ground and that in its vicinity the natural supply of underground or subterranean waters, and thus interferes with the successful raising of crops, renders the city liable for damages, and gives the owner the right to an injunction against the continuance of such wrong.

Upon a careful examination of the evidence, we hold that, though the interference here was with the use of a supply created by percolating waters, that there was such malicious interference, by means of wasting, to the detriment of

plaintiff, as that the trial court was fully warranted in interfering with the actions of the defendant to the extent that it interfered. It seems to us the decree commands no more than neighborliness should have prompted, without the aid of a court, and that the restraining provisions are just, and not oppressive.

V. The decree first entered taxed all the costs to defendant. The second one entered decreed that defendant pay two thirds of the costs. The final or amending decree seems to have adopted this last order, and so leaves two thirds of the costs to be borne by defendant. This assessment is complained of, but we see no justification for interfering with it.—*Affirmed*.

WEAVER, C. J., EVANS and PRESTON, JJ., concur.

JOHN F. DILLE, Appellant, v. O. H. LONGWELL, Appellee.

BILLS AND NOTES: Maturity—Happening of Contingency.

1 promissory note, concededly given for a valuable consideration, and clearly contemplating payment at *some* time, but payable "*when the present indebtedness of Highland Park Company is paid*," becomes absolutely due immediately after the lapse of a reasonable time in which to pay such debts, even though they are not then paid.

ESTOPPEL: Profiting from One's Own Wrong.

2 One who prevents the happening of an event which would fix liability upon him may not, when sued, allege the non-happening of such event. So held where a note was payable on the happening of a contingency, and the maker prevented the happening of the same.

Appeal from Polk District Court.—HUBERT UTTERBACK,
Judge.

MARCH 10, 1920.

THIS is a suit at law for judgment on a promissory note. The essential defense was that the maturing of the note depended upon a contingency which had not happened. Verdict was directed for defendant, and plaintiff appeals.—*Reversed and remanded.*

Nourse & Nourse, for appellant.

Clark & Byers, for appellee.

SALINGER, J.—I. The note sued on bears a date. While it promises to pay "after date," no time for payment is stated by day, month, or year. The promise is to pay after date, "when the present indebtedness of Highland Park Company is paid." The court directed verdict for defendant. By so doing, it held that, as matter of law, the note was not yet due and payable, because the debts referred to in the note had not been paid, and held further that it would never become collectable until said debts were paid.

If we must hold that the note can be collected now, even if said indebtedness still subsists, it will become unnecessary to pass upon whether same has been paid. Therefore, we address ourselves first to the legal effect of the promise in the note, though it be assumed that said debts of the company have not been discharged.

II. In *Kiskadden v. Allen*, 7 Colo. 206, recovery was permitted, though the note had words fully as indefinite as the ones found in the note before us. The same is true of *Dobbins v. Oberman*, 17 Neb. 163 (22 N. W. 356), of *Stevens v. Blunt*, 7 Mass. 240, and possibly of other cases relied on by appellant. We prefer to act without regard to these cases, because, while the qualifying words considered in them are as indefinite as is "when the debts of the company are paid," they qualified a definite promise to pay by

1. **BILLS AND
NOTES:** matur-
ity: happening
of contingency.

a stated date (a promise not found in the note before us). And the decisions in these cases turned largely, if not wholly, on the proposition that the qualification could not cancel the definite promise to pay by a stated time.

III. But in *Randall v. Johnson*, 59 Miss. 317, the promise was to pay in 90 days after the return trip of a certain vessel. This is quite as uncertain and contingent as is a promise by defendant to make payment when the debts of the company had been discharged. The *Randall* case holds that, though the vessel was lost, payment became due in 90 days after it failed to return within the time usually needed for the return trip. We see no distinction in principle between this and the instant case.

IV. This defendant gave this note in part payment for receiving a controlling interest in the company, and he assumed control and management of that company. In the course of the opinion, we shall speak fully on the effect of acquiring this interest and this control. For the present, we have to say that, after defendant got control and management, it became his duty to see to it that the company paid its said indebtedness. This being so, the case stands as if defendant had promised to pay the note when his management brought it about that the debts of the company were paid. Failure to keep promises less definite and binding than this has not been effective to delay maturity.

In the early case of *Barnard v. Cushing*, 4 Metc. (Mass.) 230, there was a statement:

"We agree not to compel payment for the amount of this note, but to receive the same when convenient for the promisors to pay."

It was held that no action would lie on the promise; but it would seem that this has been practically overruled in *Page v. Cook*, 164 Mass. 116. In that last case, the clause was: "On demand after date I promise to pay

* * * payable when payor and payee mutually agree." This was held to be a note payable on demand after such agreement was made, or ought in reason to have been made. Speaking to the *Barnard* case, it is said:

"Possibly, if the question arose now, a different result might be reached from that arrived at in that case."

A like view of the *Barnard* case seems to be taken in *Pistel v. Imperial Mut. L. Ins. Co.*, 88 Md. 552 (43 L. R. A. 219). Certain it is that the trend of the later cases is to hold that agreements to pay when convenient mean that payment is due within a reasonable time after date. That is the holding of the *Pistel* case, *supra*. In *Works v. Hershey*, 35 Iowa 340, at 343, cited by appellee, the promise was that the note should be paid at Cincinnati "when convenient." We held that these words "cannot be construed to nullify the words of the instrument, viz.: 'On demand I promise to pay,'" and that, "if any force be given to them, it will be that the maker bound himself to pay within a reasonable time after the date of the note." That, too, is the decision in *Lewis v. Tipton*, 10 Ohio St. 88, and the case approves the text in 1 Edwards on Bills, Notes, and Negotiable Instruments (3d Ed.) 154 (Note):

"And it is now adjudged that a note by which the maker promised to pay a certain sum 'when it is convenient' is due within a reasonable time."

The same rule is announced in *Benton v. Benton*, 78 Kan. 366 (97 Pac. 378), another case cited by appellee, in speaking to a promise to pay "as soon as he can." It is said this is of the same effect as a promise to pay when it would be convenient, and that a promise to pay "when convenient" is held to be tantamount to an agreement to pay within a reasonable time, upon the theory that otherwise the practical effect would be to give the promisor the option to refuse payment altogether. In *Smithers v. Junker*, 41 Fed. 101, the promise was:

"For value received I promise to pay, * * * payable at my convenience, and upon this express condition, that I am to be the sole judge of such convenience and time of payment."

It was held this does not contemplate the money shall become due only at the pleasure of the maker, without regard to lapse of time or the rights of payee, but that the maker is to have a reasonable time, to be determined by himself, in which to pay the note.

Why is a promise that one will pay when it is convenient for him less indefinite and contingent than the promise of a manager that he will pay his own note as soon as he causes the debts of the corporation managed by him to be paid? If a promise to pay when convenient is, in law, a promise to pay within a reasonable time after date, why is not that true of a promise to pay when certain debts have been caused to be paid?

In *Cota v. Buck*, 48 Mass. 588, the promise was to make payment as soon as the maker could realize the money out of property he had purchased of the payee. In *Ubsdell v. Cunningham*, 22 Mo. 124, it was to pay as soon as the maker collected from certain accounts described. In *Nunez v. Dautel*, 86 U. S. 560, payment was to be made "as soon as the crop can be sold or the money raised from any other source." In *Crooker v. Holmes*, 65 Me. 195, the note was to be paid when the maker sold his place, where he was then living. In *Sears v. Wright*, 24 Me. 278, and in *Goodloe v. Taylor*, 3 Hawks (N. C.) 458, the qualifying words made payment depend, respectively, upon the time when the maker sold certain logs, and when a house being builded for him was completed. In all of these cases, it was held that the note became payable within a reasonable time after date. Surely, the promise in each of these was as indefinite and contingent as the promise at bar.

V. A naked briefing of these decisions falls far short

of meeting the position of the appellee as forcefully as the reasoning which underlies this class of decisions. The underlying reasoning is that such provisions should be construed liberally in favor of the payee (*Smithers v. Junker*, 41 Fed. 101), and that, when all the provisions of the instrument are liberally considered together, it is plain there was no intention to agree,—say, that, if the maker did not sell his house, this would cancel his promise to pay,—no intention to agree, in effect, that the promisor had “the option to refuse payment altogether” (*Benton v. Benton*, 78 Kan. 366 [97 Pac. 378, at 379]), nor that the maker had the sole right to say “when it would suit his convenience to pay the debt” (*Smithers v. Junker*, 41 Fed. 101). And it rules it should be held it was the intention, say, on such qualification as that payment was to be made when the maker sold his house, that he must pay after he had failed to sell his house within a reasonable time.

5-a

Such words of qualification are merely an arrangement that the maker is not to pay immediately, and may delay payment until a reasonable time has elapsed, wherein, say, he can collect certain accounts. The qualification merely “prescribes the time of payment by reference, not to days and years, but to a reasonable time for the collection of the accounts.” *Ubsdell v. Cunningham*, 22 Mo. 124. If payment of a debt is to be made upon the happening of a future event, that is merely an agreement that it will be convenient to make payment when that event occurs, and not an agreement that no payment need be made within a reasonable time, even if such event fails to happen. *De Wolfe v. French*, 51 Me. 420; *Crooker v. Holmes*, 65 Me. 195, at 197. To like effect is *Lewis v. Tipton*, 10 Ohio St. 88, and *Nunez v. Dautel*, 86 U. S. 560. In that, payment was to be made “as soon as the crop can be sold or the money raised from any other source.” And the court held that “the stip-

ulation secured to the defendants a reasonable amount of time within which to procure, in one mode or the other, the means necessary to meet the liability;" and that the debt would become due upon the occurrence of either of the events named, or after a reasonable time had lapsed for either selling the crop or raising money from some other source. In *Smithers v. Junker*, 41 Fed. 101, where the note was made payable at the maker's convenience, and on express condition that he was to be the sole judge of such convenience, it was held to effect no more than the giving of a reasonable time, to be determined by the maker, wherein to pay the note.

The weight of authority construes such agreements to intend nothing except the deferring of payment until such time as gives the promisor a reasonable time wherein to cause the contingency to happen. That is to say, if he promise to pay when he sold certain logs, the understanding and agreement is merely that he has a reasonable time wherein to perform the duty to make the sale of the logs. And see *Nuncz v. Dautel*, 86 U. S. 560.

5b

Nuncz v. Dautel, 86 U. S. 560, furnishes a keystone statement of a general rule which controls the issues at bar. That rule is that if, on fair construction, the whole of the provisions indicate that both parties believe a stated thing is certain to occur at some time, and have stipulated that payment is to be made when that thing does happen, then, if that prove a mistaken anticipation, and the thing, in fact, never does happen, it is no agreement that payment should, therefore, never be made, but that it should be made within a reasonable time after it is known that the thing which was anticipated to happen will never happen, or, at least, that it has not yet happened. The fair effect of *De Wolfe v. French*, 51 Me. 420, is that, where both parties believe a future event must or will happen, and there is no

intention that, in any circumstances, the debt is never to be paid, then the fact that such future event has failed to happen within a reasonable time makes the fixing of payment with reference to such event the mere selection of a convenient time for payment, and the promisor is not released, though such event do not happen, and must pay after a reasonable time for it to happen has lapsed without its happening. In the *Nunez* case, the promise was to pay "as soon as the crops can be sold." No doubt, both parties believed that a crop would be sold, and the decision is broad enough to sustain the proposition that, if it was agreed to make payment when the crop, say, for a given year had been harvested and sold, this would be an agreement made in the belief that the crop would mature and would be sold, and that, though there was a crop failure, that would not cancel the promise to pay, but would merely postpone the time of payment to such time as, in reason, there would have been a crop to be sold, had it not failed. In *Randall v. Johnson*, 59 Miss. 317, where the promise was to make payment after a vessel made her first return trip, and it transpired she was lost at sea, the court said that it would be "a mockery of justice to hold that, because the schooner was lost at sea, and, therefore, had not made her first return trip, the appellee lost his debt." Its effect is to affirm the rule which governs where that which both parties expected to happen did not happen, as distinguished from the one that controls an agreement that no payment whatever be made unless a stated thing does happen. In *Cota v. Buck*, 48 Mass. 588, the test was said to be "whether the undertaking is to pay the amount at all events at some time which must certainly come." In *Crooker v. Holmes*, 65 Me. 195, at 197, it was ruled, in approval of *De Wolfe v. French*, 51 Me. 420:

"That, where a debt is due absolutely, and the happening of a future event is fixed upon as a convenient time for

payment merely, and the future event does not happen as contemplated, the law implies a promise to pay within a reasonable time."

VI. The note states that value was given for it. It has the words, "I promise to pay." It fixes a penalty for failure to pay at maturity. Without reference to when, if ever, the debt of the company shall be paid, there is a promise to pay interest at the rate of five per cent per annum, annually, with penalty if said interest is not then paid. With due regard to these provisions as a whole, we cannot hold that it was deemed immaterial how long a time had passed wherein to pay the debts of the company, and that it was understood no payment was ever to be made if that indebtedness was never discharged. Here is an acknowledgment that the maker is indebted to the payee. It was held, in *Benton v. Benton*, 78 Kan. 366 (97 Pac. 378), cited by appellee, that such acknowledgment of being indebted controls the qualification that payment is to be made as soon as the maker can, and creates a definite time of payment: to wit, a reasonable time after the date of the note. It is said that such agreements as this must be held to be an obligation to pay within a reasonable time, "upon the theory that otherwise the practical effect would be to give the promisor the option to refuse payment altogether;" and that, where it is acknowledged that a debt was created, rather than a gift made, there should be no construction which postpones payment for more than a reasonable time after the date of the note. To that effect is *Works v. Hershey*, 35 Iowa 340, at 343, also cited by appellee. It was said in *Lewis v. Tipton*, 10 Ohio St. 88, that, since the note recites that it was for value received, and it so appears that the payee parted with something valuable to obtain the promise, "is it reasonable to suppose that it was parted with and received as a mere gratuity, which would be the fact if there was to be no legal obligation to return an

equivalent? Why go through the useless formality of giving and receiving a written paper which was not, after all, to evidence any right or create any obligation * * * if there never was to be any payment except at the option of the signer?"

As effective a summary as any is found in *Benton v. Benton*, 78 Kans. 366 (97 Pac. 378, at 379). In *Jones v. Eisler*, 3 Kans. 134, the promise was to pay "when I receive it from government for losses sustained in August, 1856, or as soon as otherwise convenient." The *Benton* case quotes with approval from the *Jones* decision, as follows:

"When did the note sued on become due? The note is not a conditional one. The maker owed the payee, who had performed labor for him. He declares in the paper that he has received the consideration, which all must admit was a valuable one. The existence of the debt was not made to depend upon a condition or contingency. Everything necessary to constitute a promissory note, except the time of payment, is clearly expressed. * * * It could not have been contemplated that, if Jones never got his money from the government, or never should be in a situation when he could conveniently pay, that the money never was to be payable. Jones evidently expected, within a reasonable time, to get the money from the government, or, failing in that, within a like time it would otherwise be convenient to pay. After having performed work to the full amount of the note, it could not have been intended that Anders should never get his money unless Jones got his from the government, or should find it otherwise convenient to pay. The intention of the parties doubtless was that it should, in any event, be payable in a reasonable time, and such is the legal effect of the instrument."

The case of *Smithers v. Junker*, 41 Fed. 101, is fairly to like effect. Its final conclusion is that, among other things, promise to make payment on account of value received nega-

tives any intention that certain qualifying words are intended to destroy such promise.

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The note absolutely promises to pay interest annually, and agrees that, if interest is not so paid, such interest shall draw interest. How can it be said the note was not to be payable at all if the indebtedness of the Highland Park Company was not discharged? If that was the intention, then the maker took the chance of paying this interest forever; for, if it was the bargain of defendant that this note must run until the debt of this company was paid, any decision that the note is to run on forever because said indebtedness will never be paid would saddle defendant with a perpetual interest charge. Additional to what we have already set forth from *Lewis v. Tipton*, that decision combats the construction for which appellee contends, on the ground, for one, that, if it had been the intention to make the promise wholly contingent, it was unnatural for the parties to "fix a high rate of interest 'till paid.'"

VII. *Pistel v. Imperial Mut. L. Ins. Co.*, 88 Md. 552 (43 L. R. A. 219), cited by appellee, holds no more than that, if certificates are agreed to be paid for at such price as was paid for like certificates which have been surrendered in the past, recovery on such agreement is, in the absence of collusion or other fraud, limited to the prices paid for said surrendered certificate, whatever they were. The case of *Cassidy v. Taylor*, 4 Okla. 516 (46 Pac. 560), holds, in effect, that, where a sum is due a partnership, an agreement between the partners that payment to one of them should be made when the partnership debt was paid in full, delays a right of the one partner to sue until such full payment has been made. And *Jones v. Eisler*, 3 Kans. 134, recognizes that these peculiar facts are the turning point in the *Cassidy* case. We are unable to find anything in *Ramot v. Schotenfls*, 15 Iowa

457, that supports appellee. The case *Rollins v. Denver Club*, 43 Colo. 345 (96 Pac. 188), is strongly urged by appellee. A careful analysis of the case discloses it is upon facts which differentiate it from such decisions as *Nunes v. Dautel*, without putting it into conflict with cases of the *Nunes* type. The court concedes that, if a promise made that all dividends should be paid pro rata stood alone, cases such as that of *Nunes* might be pertinent.

The club was incorporated for social purposes purely, without aim to make pecuniary profit. Its members, including plaintiff, made a subscription to raise a building fund. The club promised to repay the members, with interest, "at the convenience and pleasure of the club." The promise was further qualified by the statement that no demand would be made for payment, in whole or in part, until such payment could be "prudently discharged in the discretion of the board from the surplus revenue of the club." All consideration of the question of contingent promise is quite incidental. The decision involves somewhat the reasoning of the *Cassidy v. Taylor* case, because some consideration is given to the fact that the transaction has the aspect of a joint venture, or partnership. And it is deemed material to point out that there was no promise to pay out of funds generally, but out of a specific fund.

The case turns largely upon a finding that, since plaintiff averred the discretion of the board had not been prudently exercised, that sufficient funds were on hand, and that still the board wrongfully refused to apply them in payment, it is made plain he did not understand he had an absolute agreement to repay, but was to be paid if there existed such surplus revenue as that an honest exercise of the discretion of the board demanded an application of such surplus to the payment of this obligation. The court points out that practically all the evidence was directed to whether there had been an abuse of said discretion. The final

conclusion is, in effect, that there was a failure to establish an improper exercise of discretion; that courts of equity are loath to interfere with the discretion of the directors of a private corporation concerning the declaration of dividends, and especially so where that corporation is not organized for pecuniary benefit, and where complaint of abuse of discretion is made by a member of the social corporation.

While there is language in *Glass v. Adoue*, 39 Tex. Civ. App. 21 (86 S. W. 798), which would seem to aid the appellee, an examination discloses that the point we are considering was not mooted. The only question tried out was whether the maker was, in fact, able to pay, it being assumed without dispute that he need not pay unless he was, in fact, able. Possibly, *Tootell, Ex Parte*, 4 Ves. Jr. *372, was rightly decided. The promise held to be purely contingent was:

"I hereby promise to pay * * * at such a period of time that my circumstances will admit without detriment to myself or family and not to be distressed upon any account whatsoever until such time that my circumstances will be as above described."

This was held, and probably rightly held, to be a conditional promise, which might or might not mature.

It may not be denied there is an exceptional case, here and there, which comes close to holding that, say, a promise to pay when one is able, or when one's circumstances will permit it, is purely conditional, and there never can be a recovery until the condition actually happens. See *Nelson v. Von Bonnhorst*, 29 Pa. 352; and *Salinas v. Wright*, 11 Tex. 572. But we think it has been shown that the great weight of authority goes at least so far as to allow a recovery on such agreement as the one at bar, even if the debts spoken to have, after reasonable opportunity to pay them, not been paid.

VIII. Were we to concede that the construction we have given the proposition of the note at bar ought not to obtain generally, it would still be a sound interpretation of the rights of these particular litigants.

2. **ESTOPPEL:**
profiting from
one's own
wrong. The maker of the note was, after he signed the same, virtually the owner of the Highland Park Company. It was his duty to bring about the payment of its debts. He seems to have made no attempt to have these debts paid. He reorganized his corporation into a new one, and so put the corporation which owed said debts out of existence, and deprived it of all power to pay through the agency of successful operation, or at all. He should not be permitted to defeat his note with the defense that this corporation had failed to pay those debts. To permit him to do that would be a clear violation of the rule that, where one prevents the happening of an event upon which his liability is to arise, action may be maintained against him, without proof that such event has happened. See *Hughes v. McEwen*, 112 Miss. 35 (72 So. 848, 849); *St. Louis D. Beef & Prov. Co. v. Maryland Cas. Co.*, 201 U. S. 173, 181; *Shulte v. Hennessey*, 40 Iowa 352; *Larned v. City of Dubuque*, 86 Iowa 166, 181; *Garbutt v. Citizens' L. & E. Assn.*, 84 Iowa 293, at 297; *Sears v. Wright*, 24 Me 278, at 280, and *Guire & Diehl v. Page*, 4 Serg. & R. (Pa.) 1. The case of *Crooker v. Holmes*, 65 Me. 195, at 199, speaks with peculiar persuasiveness in support of the pronouncement we have just made. And *Hughes v. McEwen*, 112 Miss. 35 (72 So. 848), is quite relevant. The court finds it to be plain "that it was the intention of both parties to make the note payable after 80 acres of land had been sold, and the purchase price of same paid." It states that the question before it is whether, where there is a debt owing, and the payment is postponed to a future time, which depends upon the happening of a future event, resting entirely within the discretion of the appellee, and

which event the appellee may never cause to happen, "appellee can defeat the payment of the debt due by her to appellant by never selling the land," and this though the debt is an absolute one, and is admitted by the appellee. It is said that:

"While there are some authorities to the contrary, the great weight of authority and the best-reasoned cases hold that, in cases of this kind, the debt becomes due absolutely within a reasonable time."

And, as indicated, that is our view.

IX. What is a reasonable time is a question of fact. *Capron v. Capron*, 44 Vt. 410, at 412; *Nunez v. Dautel*, 86 U. S. 560; *Lewis v. Tipton*, 10 Ohio St. 88. But we do not have that question to decide. For here, as in *Works v. Hershey*, 35 Iowa 340, 343, "there is no claim in the answer that a reasonable time had not been given defendant after the execution of the note for its payment."

We hold it was error to direct verdict for defendant.—
Reversed and remanded.

WEAVER, C. J., EVANS and PRESTON, JJ., concur.

HELEN SANDINE, Appellant, v. JOEL E. JOHNSON et al.,
Appellees.

PARENT AND CHILD: Right of Worthy Parent Not Absolute. A
1 parent of good character does not necessarily possess an *absolute* right to the custody of his or her minor child. The best interest of the child is paramount on the issue of custody. —

ADOPTION: Guardian May Consent. The duly appointed guardian
2 of a minor child, whose father is dead and whose mother is insane, has authority, under Sections 3193 and 3251, Code, 1897, to consent to the adoption of such child.

Appeal from Buena Vista District Court.—JAMES DELAND, Judge.

MARCH 10, 1920.

HABEAS corpus proceeding, which involves the right to the custody of a child. After a hearing upon the merits, the trial court discharged the writ and dismissed the petition. The plaintiff appeals.—*Affirmed.*

Oliver, Harding, Oliver & Royal, for appellant.

Healy & Faville, for appellees.

EVANS, J.—Helen Sandine is the child whose custody is in question. The suit is brought in her name by her mother, Fannie, now known in the record as Mrs. Henderson. For convenience, we shall refer to the mother as the plaintiff. The defendants have had the custody of the child since her babyhood, having acquired the same under appealing and compelling circumstances. The defendants claim, also, to have adopted the child. The articles of adoption are assailed by plaintiff as invalid. The contest is a pathetic one, and we are constrained to speak tenderly in dealing with the rights of the respective contestants.

Helen was born on December 30, 1910. The family into which she was born consisted of the father, Gust Sandine, the mother, Fannie, plaintiff herein, and two older children, about 8 and 10 years of age. It was a respectable family, in very moderate circumstances, and dependent upon the current earnings of the father. When Helen was five weeks old, the mother became insane, and was committed to the asylum. The father, with the help of friends, including these defendants, cared for the babe, as best he could. In November of the same year, 1911, the mother was paroled from the asylum, and returned home. One

1. PARENT AND
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month later, the father died. Two days thereafter, the mother became again violently insane, and was returned to the asylum, where she remained for several years. She was first paroled therefrom in the fall of 1915, and finally discharged in the fall of 1916.

Upon the death of the father, and this disability of the mother, a loyal uncle, Knute Sandine, the brother of the deceased father, undertook the protection of the little brood in their own home. He was himself unmarried. He employed a domestic to do the work of the household, and received more or less help from sympathetic friends. But domestic help proved to be temporary, and it left him with the babe in his arms. He was helpless to give it the care which it required. He consulted with friends as to the advisability of giving up the child, in its own interest, to some Orphans' Home or Home Finding Society. In the meantime, kind neighbors across the way took the child into their home, and for one year and a half reared her and loved her. These neighbors are the defendants herein. Knute was regularly appointed as guardian of her person, under the provisions of Code Section 3193.

In January, 1914, these defendants purported to adopt Helen as their own child. To that end, articles of adoption were duly signed by them and by Knute Sandine, her guardian, and by the mayor of the town.

2. ADOPTION:
guardian may
consent.

This act of adoption was characterized by the fullest good faith on the part of the defendants and on the part of the guardian.

The superintendent of the asylum at Cherokee was consulted as to the probability of the recovery of the mother. It was the opinion of the superintendent at that time, as expressed to these parties, that she would never recover. Upon her parole, in the fall of 1915, she made her home with her brother, a few miles distant from the home of the Johnsons. She was welcome at the Johnson home at all times,

and visited there a number of times in the course of a year. These friendly personal relations always continued. About one year after her full discharge from the asylum, the plaintiff went to Sioux City, and engaged there in service as hired help, domestic or otherwise. In December, 1918, she was married to her present husband. Some months thereafter, she asked for the restoration of her child. This suit was begun in May, 1919.

The contention made in her behalf may be stated broadly as follows:

(1) That the articles of adoption executed by the defendants are invalid and void.

(2) That, as the surviving parent, the plaintiff has the absolute right to the custody of her child; and that such right is paramount to any consideration of the best interest of the child, in that the mother has not forfeited such right by any wrong-doing on her part.

For the defendants, it is contended that the articles of adoption are valid; that, even if they are not, the circumstances disclosed by the evidence are such as to make the best interest of the child a consideration paramount to the natural rights of the mother.

I. Are the articles of adoption valid? They were legal in form. They were duly executed by the defendants as adopting parents. They were likewise duly executed by the guardian and by the mayor of the town of Marathon. Whether the action of the mayor of the town of Marathon was effective for any purpose, we will not inquire, but will assume the challenge of the appellant in that regard as well taken. *Anderson v. Blakesly*, 155 Iowa 430; *Webb v. McIntosh*, 178 Iowa 156.

Was the consenting signature of the guardian effective? The statute of adoption, Code Section 3251, does not, in terms, include a guardian as a consenting party. It does require the consent of the parents; "or if either is dead, then

the consent of the survivor." This was a case where one parent was dead, and is covered by the portion of the statute here quoted. This statute is comprehensive in its scope, and evidently aims to provide for all contingencies. In other words, it aims to provide a method of adoption for any and every child, under whatever circumstances. If we may not broaden the terms of the statute so as to include the guardian of the person of a child, then there is no way provided therein whereby this child could have been adopted. The mother, as surviving parent, could not have consented, for want of capacity. A consent by the mayor of the city or by the clerk of a district court could not be effective, because "both parents" were not dead, nor was the child "abandoned." Turning to the Code chapter on guardianship, Sections 3192 and 3193 are as follows:

"Section 3192. Parents are the natural guardians of the persons of their minor children, and equally entitled to their care and custody.

"Sec. 3193. The surviving parent becomes such guardian, but, if there is none, the district court shall appoint one, who shall have the same power and control over his ward as the parents would have, if living."

The guardian was appointed under the latter section, as guardian of the person of the child, on the theory that there was no surviving parent competent to act as such guardian of the person. Here, again, we must broaden the terms of the statute, in order to give it a rational construction. To construe this statute literally would be to say that the surviving parent, though *non compos mentis*, was entitled, as a matter of right, to the custody of the person of the minor. We think, therefore, that the guardian was properly appointed, under this section, as guardian of the person of the child. Being the guardian of the person of the child, he stood, for the time being, *in loco parentis*, and, by the literal terms of the statute, had the "same power and control

over his ward as the parents would have, if living" and *compos*. Reading this section and Section 3251 together, the only rational construction of the latter section is that, for the purpose of its application, the guardian of the person of a minor is the legal equivalent of the parent. Such a construction accords with the spirit and manifest purpose of both sections. Such a construction involves no menace to the right and interest of either parent or child. The guardian is an appointee of the court, and an arm thereof. He is directly amenable to the court. It is perhaps true that such an act might be reviewed by the court, and even set aside, if found improvident or unwarranted. No question of that kind is involved herein.

We reach the conclusion that the guardian of the person was authorized by the statute to exercise the power of the parent, and that his execution of the adoption papers was as effective as though it had been done by a *compos mentis* surviving parent.

II. Our foregoing conclusion becomes, of itself, quite decisive of the case. Our examination of the record satisfies us, however, that, if our conclusion upon such question had been otherwise, we should still have to affirm the finding of the district court. Beyond all question, the best interest of the child, in its largest and best sense, requires that her custody remain where it is. This is not saying that the mother has committed any wrong, whereby she has forfeited any rights. But the circumstances which overwhelmed her rendered it impossible for her to perform the duties of a mother to her child. To all appearances, her disability was permanent. Could her sane self wish, under such circumstances, that no one should hear the cry of her babe? Its need was immediate and imperative. Something must be done by somebody, or the babe must needs perish. Temporary expedients, in such a case, are not usually practicable. The tender little twig must be permanently grafted upon

another stem. This is the natural method of human affection, and the law recognizes it and protects it. Concededly, the home that opened its door wide to this least of human beings is an ideal one.

Whether, under her present circumstances, the mother could be deemed suitable to protect the best interests of the child would be a painful question to discuss. She is now married, and it is to be hoped that her marriage may prove a happy one. But the fact of such marriage would make it incumbent upon the court to inquire into the suitability of her husband to have custody of the child, as its stepfather. Much stress is laid by counsel for defendants upon his unfitness for such responsibility. It is to be conceded that rigid cross-examination of him as a witness failed to disclose his history or his occupation. The trial court might well, therefore, have regarded him as an additional impediment in the way of plaintiff's resumption of her parental relations with her child. Sufficient to say that a careful reading of the record leaves no doubt in our minds that the case was properly decided in the district court. Discussion by us of the details of the evidence is not important enough to warrant the infliction of added pain to a maternal heart that commands our pity. The order of the district court must be—*Affirmed*.

WEAVER, C. J., and PRESTON, J., concur.

SALINGER, J., concurs in Division I of this opinion.

STATE OF IOWA, Appellee, v. RAY ANDREWS et al., Appellants.

INTOXICATING LIQUORS: Medicated Intoxicant. Injunction will lie to restrain the sale of a combination of one fourth alcohol

and certain medicinal substances, camouflaged as "bitters," and working the result of rendering the user full at the head and empty at the bowels at the same time.

Appeal from Palo Alto District Court.—D. F. COYLE, Judge.

MARCH 10, 1920.

AFTER a full trial on the merits, Andrews, the Drug Company, and the owner of the premises, were enjoined from maintaining a liquor nuisance. They appeal.—*Affirmed.*

Cook & Balluff and *McCarty & McCarty*, for appellants.

H. M. Havner, Attorney General, *B. J. Powers*, Assistant Attorney General, and *John Menzies*, County Attorney, for appellee.

PRESTON, J.—The defendants, other than the owner, had been conducting a drug business in the premises described, for about two years. They had in stock various proprietary medicines and drugs, among which was a preparation known as Harlax, or Harlax Stomach and Liver Regulator, which was a preparation manufactured by a wholesale drug company in Rock Island, Illinois. The company formerly manufactured a preparation known as Black Hawk Stomach Bitters, but it was changed to Harlax. It is the same preparation, and made according to the same formula. They simply changed the name. The percentage of alcohol was reduced a little, from about 28 per cent to from 23 to 25 per cent by volume, in Harlax. In addition to the 23 per cent alcohol, it contains a small percentage of sugar and other solids, and a certain percentage of cascara. There is evidence to show that Harlax was purchased by a number of witnesses, for use as an intoxicating beverage, and that they did so use it, and became intoxicated. The three parties so having purchased and used it are shown to have been drunkards. One of them drank a bottle containing something

more than a pint, in 20 hours. Defendants introduced several witnesses who testified that they purchased the preparation for medical purposes. Defendants contend that Harlax, while containing 23 per cent alcohol, was sufficiently medicated to make it undesirable for use as a beverage, and that it was, in fact, a medicine. Witnesses for the State testify as to the reputation of the place, and that it had the reputation of being a place where a large amount of this so-called stomach bitters was sold, and where people could buy intoxicants of some kind that would make men drunk. The reputation was with reference to the stomach bitters and the sale thereof to drunkards. There is no claim that other intoxicating liquors were sold. Defendant had a government license to sell intoxicating liquors at retail. Defendant explains this by saying that he keeps it for his protection, because he keeps many different kinds of patent medicines that contain a high percentage of alcohol, and, when a government man comes to the store, he inquires for the stamp, and, if there is none, the government man looks over the stock. Defendant testifies that the effect of Harlax is that it is a laxative, and also "kind of gave a general tone to the system." A doctor testifies that the use of this preparation would act upon the bowels decidedly, in an ordinary individual, and, if its use is continued from day to day, or from time to time, it would have a depleting effect, after a while, but says further:

"Q. Would that prevent a fellow from getting intoxicated? A. I should say not. Q. He would get full and empty at the same time? A. He would get full in the head and empty in the bowels."

The bark from which cascara is obtained is variable. Some of it is strong, and some not so strong. Appellant cites *State v. Gregory*, 110 Iowa 624, and *McNiel v. Horan*, 153 Iowa 630, to sustain the point that, if the liquor was so compounded with other substances as to lose its distinctive

character as an intoxicant, and to be no longer desirable as a stimulating beverage, and was, in fact, a medicine, then defendant is not guilty. Under the evidence in this case, the defendant has violated the law, under the rule laid down, even in the *Gregory* case and the *McNiel* case. See, also, *State v. Snyder*, 185 Iowa 728; *State v. Klein*, (Iowa) 174 N. W. 481 (not officially reported); *State v. Miller*, 92 Kan. 994 (L. R. A. 1917 F 238, 243).

We are content with the rule, even though present conditions may be as contended by appellant. Each case must stand upon its own bottom. *State v. Silka*, 179 Iowa 663, 670. The judgment and decree are—*Affirmed*.

WEAVER, C. J., EVANS and SALINGER, JJ., concur.

STATE OF IOWA, Appellee, v. ARTHUR DOLSON, Appellant.

NEW TRIAL: Insufficient Evidence—Conflict—When Properly

- 1 **Raised.** Insufficiency of evidence to support a verdict, or inconsistency between evidence and verdict, may be raised for the first time in a motion for new trial.

BURGLARY: Possession in Lieu of Ownership—Evidence. "Use,

- 2 possession, and control" of a railway car in a named company is not established by evidence that an employee of such company sealed it while it stood on a track, the ownership of which is not affirmatively shown.

BURGLARY: Purpose to Which Railway Car Is Put. The purpose

- 3 for which merchandise is put and kept in a railway car must be shown, in order to meet the statutory elements of the offense. The naked presence of merchandise in a car at the time of a breaking and entering is insufficient to show that the car was one in which goods were kept for "use, sale, or deposit."

Appeal from Pottawattamie District Court.—O. D. WHEELER, Judge.

MARCH 10, 1920.

APPEAL from a conviction for breaking and entering into a railroad car.—*Reversed and remanded.*

John J. Hess, for appellant.

H. M. Harner, Attorney General, *F. C. Davidson*, Assistant Attorney General, and *C. E. Swanson*, County Attorney, for appellee.

SALINGER, J.—I. To the complaint that the evidence does not sustain the indictment, the State responds that it is doubtful whether the motion for new trial raises that question. We entertain no doubt on that point, and find it to be indubitable that the motion in terms urges that the verdict is contrary to and not supported by the evidence, and is the result of passion and prejudice. An additional contention is that we may not review the sufficiency of the evidence because there was no motion by defendant for a directed verdict. This position is against the settled rule in this court. We have frequently held that though, by reason of a waiver, the case stands as though there had been no motion to direct, yet "this does not preclude complaint that the verdict is contrary to and not supported by the evidence." *State v. Bosworth*, 170 Iowa 329; *State v. Asbury*, 172 Iowa 606; *Hansen v. Hough*, 177 Iowa 93; *Boyd v. Buick Auto. Co.*, 182 Iowa 306.

II. The indictment charges defendant with the crime of breaking and entering a railroad car feloniously, with intent to commit larceny, in that he, with such intent, broke and entered into "Soo Line Car No. 27680," which car was then and there "in the use, possession, and control of the Illinois Central Railroad Company."

1. NEW TRIAL:
insufficient
evidence: con-
flict: when
properly
raised.

2. BURGLARY:
possession in
lieu of owner-
ship: evidence.

It may be granted the citations for the State hold defendant may be convicted though the car was owned by the

"Soo Line," if the Illinois Central Railroad had possession. But, of course, that does not help decide whether the proof shows such possession. That appellee has the burden on that question is not denied. That such burden may be discharged by circumstantial evidence is true. Has it so been discharged? The State asserts it has been done, because one who "worked for the Illinbis Central" sealed the Soo Line car, and because it is shown that the car stood on an Illinois Central track when said sealing was done. It is not claimed that the act of sealing suffices, standing alone. The argument is that the question of possession was for the jury, if, in addition to said sealing, there is evidence that the car stood on an Illinois Central track, when it was sealed. If the sealing makes no jury case unless the car sealed was on a track owned by the Central, it follows that, though there might not be a conviction even if the ownership of the track was proven, as laid, there can be none if such ownership is not shown. The fact that someone who, in some capacity, worked for the Illinois Central sealed a car standing on a track is no more evidence that the Illinois Central owned said track than evidence of such ownership would be evidence that such sealing was done. In a word, the controlling question at this point is the nature of the evidence of ownership. It is this: Union Avenue runs just north of the depot of the Illinois Central Railroad, and the tracks of that railroad occupy that street, in large part. Three tracks lay on the north side of its freight depot, or freighthouse, and the car in question was on the southernmost track, or the one nearest to that freighthouse.

There is an attempt to buttress this evidence by arguing that, "there is no evidence to indicate that any other railroad company had any depot or any tracks anywhere near this freighthouse." The defendant had no burden to show that the track did not belong to the Illinois Central, and all lack of evidence injures nothing but the case of the State.

Its case cannot be strengthened by the failure or weakness of the testimony for the defendant. See *Farmers & M. St. Bank v. Shaffer*, 172 Iowa 173. It is immaterial what either defendant or anyone else has failed to show. The question is not whether there was a weakness in proof that the tracks belonged to someone other than the Illinois Central, but is whether the State has shown that they did belong to that corporation.

More persuasive than is the argument based on the weakness of evidence tending to show someone other than the Illinois Central owned said tracks is the fact that, if they did belong to that company, it was easy to show that fact. And here there is almost room for the operation of the rule that a failure to produce evidence peculiarly and readily available to the parties having the burden raises a presumption that no such evidence exists.

On the authority of *State v. Carson*, 185 Iowa 568, *State v. O'Donnell*, 176 Iowa 337, and *State v. Saling*, 177 Iowa 552, and cases therein cited and approved, we hold the evidence fails to support the charge that the Illinois Central had "use, possession, and control" of said car.

III. Assume that so much of the charge as alleges that the goods in the car were kept there for "transportation" is surplusage. But that still leaves it for the State to show

that the car entered was one "in which any goods, merchandise, or valuable things are kept for-use, sale, or deposit." What is the evidence of that? One witness says, "They were box cars, loaded with merchandise;" that "Box No. 2" was in the door of the car, about half way out, "so as to drop it down."

"Q. Was there anything else in the car door? A. There was a few boxes shoved to the car door. I didn't examine the rest of them, just the one he was going to drop out.
Q. What was there in this car besides this box? A. I didn't

3. BURGLARY:
purpose to
which railway
car is put.

examine the car,—didn't go into it; but I saw there was something else, and the car was pretty well filled with boxes and cartons and mixed stuff. Q. Where was that box of coffee? A. Right where he threw it when the night clerk let the window drop."

The only other evidence on this point is that a witness saw some pasteboard boxes in the car, near the door.

Is this evidence that the car was one in which these things were kept either for use, sale, or deposit? The evidence does not show for what use either the Soo Line, the owner of the car, or the Illinois Central, its alleged possessor, kept said goods in this car, nor show for what use anyone kept them there. There is no evidence that these goods were in the car for sale or deposit. It may be the legislature should not have hampered the State by making the commission of the crime depend in part upon the purpose for which goods were kept in the car broken into. But it certainly has made that element a part of the statute crime. And the State recognizes this, by alleging in the indictment that said goods were kept in the car entered, for use, sale, and deposit.

The verdict lacks support because there was a failure to prove this allegation. This is no holding that it cannot be established by evidence either direct or circumstantial. It is no attempt to settle what evidence will send such allegation to the jury. What we decide is that the total of all the evidence in this case is too weak to sustain this charge in the indictment.

IV. We give no consideration to the assignment that the court erred in giving Instruction 10, because no exceptions to instructions seem to have been taken.

V. The arguments suggest there is a controversy over whether the prosecution was not under a statute which does not authorize the penalty the court inflicted. In view of our granting a new trial, and of the manner in which this

point is raised, we prefer to express no opinion upon this at this time.

The judgment below must be reversed.—*Reversed and remanded.*

WEAVER, C. J., EVANS and PRESTON, JJ., concur.

FRANK EATON, Plaintiff, v. JOSEPH E. MEYER, Judge, et al.,
Defendants.

INTOXICATING LIQUORS: Contempt—Evidence. Evidence held sufficient to sustain a conviction for contempt.

Certiorari from Polk District Court.—JOSEPH E. MEYER,
Judge.

MARCH 12, 1920.

DEFENDANT was accused and found guilty of contempt for the violation of a liquor injunction, and he brings this proceeding.—*Affirmed.*

Parsons & Mills, for petitioner.

A. G. Rippey, County Attorney, and George F. Henry, for defendants.

PRESTON, J.—In 1916, in an injunction suit, it was found that petitioner was engaged in owning and keeping intoxicating liquors, contrary to law, and carrying about on his person intoxicating liquors, and was then and there unlawfully selling the same, in violation of law. He was enjoined from owning, keeping, and selling intoxicating liquors, either by himself, his agents, servants, employees, or lessees. In February, 1917, he was found guilty of contempt of court for the violation of such decree. The finding in that case was offered in evidence in the present pro-

ceeding, for the purpose of showing that it was petitioner's second offense. Defendant states that the first conviction was offered in evidence as bearing on the punishment in the instant case, as provided by the statute. He was again found guilty in April, 1918, in this proceeding. The violation of the injunction charged herein is alleged to have taken place on the 24th of January, 1918. The only question is whether the evidence is sufficient to justify the finding of the trial court. It is contended by petitioner that the evidence does not show that he was keeping liquor, or that he sold it, or was concerned therein, and that there was no evidence to so show. We cannot agree that there was no evidence for the State on the fact question. It must be conceded that there was a conflict in the evidence. Notwithstanding the conflict, we are satisfied that the evidence was sufficient to sustain the finding of the trial court.

We shall not go into the evidence in detail. On January 24, 1918, police officers Day, Kelsoe, and Marshall made a raid on the place known as Temp Bar, 409 East 6th Street, in Des Moines, and arrested Eaton. While they were raiding the place, petitioner Eaton came in, and they arrested him. They found a man named Butler behind the bar. They searched him, and found four pints of whisky on his person. It was known as Old Declaration whisky. The rinsing tanks smelled of liquor. After Eaton was arrested, he went behind the bar and picked up the keys, either in the cash register or off it. Eaton said he could lock the door. He took some money from the cash register, and put it in a drawer in the back bar, and then went out, locked the door, and gave the keys to one of the officers. When they went to the police station, a bulletin was made out, showing the arrest, and, in response to a request by one of the officers to fill out the blank in the bulletin, Eaton said his residence was at 618 East Grand Avenue. Thereupon, officers Day, Jackson, and Denney went to 618, where they found Eaton's

wife, a colored cook, and another woman. They there found 35 quarts of beer and 19 pints of Old Declaration whisky, the same kind of whisky which was found on the man Butler, behind the bar. Day testified that he had seen Eaton behind the bar at the place in question, a number of times, the last time a few days before Eaton's arrest. The officers testify to the facts before set out.

Petitioner and his wife testify that he had no interest in the intoxicating liquor found at the residence, and that he had not been staying at the premises for three or four weeks, but that he had been rooming on East Sixth Street. She says the telephone was in her name, and that none of the liquors found at the residence were kept for sale, contrary to law. Petitioner says he had no interest in the Temp Bar, and that Butler was not in his employ; that he had no interest in the keys or money referred to. Other witnesses testify, on behalf of petitioner, to some of these circumstances. Under the evidence, Eaton exercised the rights of proprietorship of the Temp Bar and the money, and had been seen behind the bar in the place a short time before. The trial court was justified in finding that the business was conducted in such a manner as to evade the law, and that the liquor was kept at Eaton's home, and doled out in small quantities to Butler. The trial court saw and heard the witnesses, and was in a better position than we can be to discover the truth, and its finding is given some weight. *Cheadle v. Roberts*, 150 Iowa 639, 642.

The judgment is—*Affirmed*.

WEAVER, C. J., EVANS and SALINGER, JJ., concur.

POLK GRANT et al., Appellees, v. FLEMING BROTHERS COMPANY et al., Appellants.

MASTER AND SERVANT: Workmen's Compensation Act—"Arising Out of and in the Course of Employment." Evidence reviewed, relative to the scope of a workman's employment and the circumstances attending his death without eyewitnesses, and held to support a finding that the death arose out of and in the course of the employment.

Appeal from Polk District Court.—LAWRENCE DE GRAFF, Judge.

MARCH 12, 1920.

PROCEEDING to recover compensation under the Iowa Workmen's Compensation Act. The committee of arbitration made an award. Upon review, this award was confirmed by the industrial commissioner. Upon appeal to the Polk County district court, the order of the industrial commissioner was affirmed, and judgment was entered for the claimants. From such order and judgment of the district court, the defendants have appealed.—*Affirmed.*

Brockett, Strauss & Blake, for appellants.

S. Joe Brown, for appellees.

EVANS, J.—On May 26, 1918, Oscar Grant, an employee of the defendants, sustained fatal injuries, from which he died within a few minutes. The one question of controversy in the case is whether the injury to Grant arose out of and in the course of his employment. If the affirmative is found upon this question, the amount of the award has been stipulated by the parties.

There was no witness to the circumstances which were the immediate cause of the injury. In order to prove, there-

fore, that the injury of decedent arose out of and in the course of his employment, reliance must be had upon circumstantial evidence. The injury resulted from an elevator accident. Grant was a janitor and man of all work about the Fleming Building, a large office building in the city of Des Moines. The accident happened on Sunday. Only one of the three passenger elevators was in operation for passengers on that day. The south elevator, not in use for passengers, was under inspection by its engineers. It was their duty on that day to inspect and oil the same. This duty had been completed only a few seconds before the accident in question. The last conversation with Grant was had with these engineers, Harris and Allen. Grant had been at work, putting in some partitions on the sixth floor. He had some material there, and perhaps other articles, which were to be brought down to the basement by means of an elevator. His purpose was to bring the same down in the south elevator, and this purpose had been communicated to these engineers, and consented to by them. The construction of this elevator is such that a release of the "up-lever" will send it from the basement to the top floor. Likewise, a release of the "down-lever" will send it from the top floor to the basement. The circumstances clearly indicate that, while the elevator was in the basement, Grant had undertaken to enter it, pursuant to his purpose to go after his material on the sixth floor, and that, while he was entering it, the up-lever became, in some manner, released. The upward thrust of the elevator crushed Grant against the floor above, before he had got to a point of safety within. Whether the release of the up-lever was accidental or unintentional, or whether it was done by Grant in an attempt to operate the elevator, is involved in uncertainty. The contention of appellant is that he was operating the elevator, and that such operation was beyond the scope of his employment, and that, therefore, his resulting injury was out-

side of the contemplation of the Compensation Act.

The scope of Grant's employment was testified to by one of his employers as follows:

"Q. Mr. Fleming, did you personally attend to the employment of the deceased? A. Yes, sir. Q. When had he entered the employ of Fleming Bros., Incorporated? A. On about the 10th or 12th of January. Q. And he continued with you until the time of his death? A. Yes, sir. Q. What was his work, and what did he do around there? A. He did janitor work, and helped put in partitions, in making changes up through the building, and helping take up mortar and mix mortar, and was janitor and handy man, to do any work that was to be done. Q. This matter of getting material from the sixth floor,—that was part of his work? A. Yes. Q. Did he have to do anything with this hoist in the rear of the building? A. Yes; almost daily for some time he got out ashes and helped get out freight and get in plaster or mortar and tiles, and everything in connection with building and putting in new partitions, etc., and helping take out furniture. Q. Do you think, Mr. Fleming, he was familiar with the working of the passenger cages? A. I think he was. He did not handle passengers at all. Q. You think a man that could run the freight elevator hoist outside could manage an elevator? A. I think he could from the time he had been running it."

Engineer Harris testified to the last conversation of Grant as follows:

"A. Well, we were inspecting the elevators. We make a system every Sunday of going over all of them. Of course, we go over them during the week, but do the oiling and other things on Sunday. We were just finishing on the south car, and this boy said he wanted to use the car,—that is, Grant,—to get some stuff on the sixth floor; and we told him we would be ready in about ten minutes; and we finished the car. I was the last man out, and left the door

shut, and the lever in a down position; and Grant was not there at that time. We were in the shop, and were wiping grease off of our hands; and just then, he appeared at the shop door, and he says to the assistant engineer, 'I am ready now, Mr. Allen, to get that stuff from the sixth floor,' and Allen answered, 'All right, kiddo, as soon as I get a drink, will bring it down for you.' "

Assistant engineer Allen testified to the same conversation, as follows:

"Q. Where was the deceased when you saw him at that time: that is, after the doors in the basement had been closed? A. He came down the stairway, and said he was ready to go up. Q. Clear down? A. Yes. Q. He was in the basement? A. Yes. Q. You left and went somewhere? A. I went to the sub-basement, after a drink. Q. That is the last you saw of the deceased before the accident? A. Yes, sir. Q. What was it he wanted to do with the elevator, according to what he told you? A. He wanted me to take the elevator up to the sixth floor, after lumber. Q. You indicated that, as soon as you got a drink, you would go with him? A. Yes, sir."

Twenty-five seconds later, the injury had occurred, and these witnesses heard the call of distress. It will be observed, from the testimony of the employer, that the scope of the employment was very broad and indefinite. He was not only janitor, but "handy man, to do any work that was to be done." The only limitation put upon the scope of this employment by this witness was that "he did not handle passengers at all." There is no claim that he was attempting to handle passengers at this time. The clear implication of the testimony of the same witness is that he was familiar with the working of this elevator. There is no claim that he was not justified in bringing down his material from the sixth floor by means of this elevator. The claim is that he was not justified in attempting, himself, to work the ele-

vator, and that he should have waited for Allen to do this. It is very clear that he would have been justified, in the course of his employment, in entering the elevator with Allen, for the purpose of getting his material. Having been assured by Allen that he would go with him, as soon as he got a drink, does the fact that Grant entered the elevator, a few seconds before Allen was expected to follow him, carry him outside the scope of his employment? We cannot think so. Here, again, we must not lose sight of appellants' premise. This premise is that Grant attempted to get into the elevator, not for the purpose of preceding Allen, or waiting for him, but for the purpose of operating the elevator, himself. This premise, however, rests upon an inference from the circumstances which is not essential to plaintiff's case. To draw this inference is more to the interest of the defendants than to that of the plaintiff. As between the two inferences, we think the first has the stronger support in the circumstances.

Be that as it may, we think it fairly appears from the evidence that the scope of this employment was so indefinite, and the nature of it so miscellaneous, and the attempted operation of the elevator, if such, at this time, was so in line with the performance of his immediate conceded duty to remove the material from the sixth floor, that such attempted operation should be deemed, *prima facie* at least, to have been within the scope of his duties. If the fact that Allen intended to go up with him, for the purpose of operating the elevator for him, tended to negative such scope of his own employment, it would only negative it by inference. There is a sense in which the burden of that inference would be on the defendants. There is no evidence that it was the duty of Allen to operate the elevator on this day at all. It does appear that the elevator was not operated on Sunday for passengers. Whether Allen had any duty to perform, pertaining to said material, or whether he was

simply volunteering to aid Grant, does not appear.

We reach the conclusion that the case was properly decided in the successive tribunals through which it has come. The order of the district court is, therefore,—*Affirmed*.

WEAVER, C. J., PRESTON and SALINGER, JJ., concur.

J. C. McCABE, Appellant, v. MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, Appellee.

RAILROADS: Accidents on Tracks—Contributory Negligence. Contributory negligence results, as a matter of law, from the act of knowingly placing the foot of a ladder so close to the track of a railway that it will be hit by a passing train, and working thereon, with an unobstructed view of the track for three quarters of a mile, even though plaintiff testifies that he constantly looked and listened for approaching trains.

NEGLIGENCE: Last Clear Chance—Failure to Discover. The "last clear chance" doctrine has no application when the record affirmatively discloses that the peril of the injured party was never discovered until after the accident.

Appeal from Polk District Court.—GEORGE A. WILSON, Judge.

MARCH 12, 1920.

ACTION for damages for personal injuries sustained by plaintiff through the alleged negligence of the defendant. At the close of plaintiff's evidence, there was a directed verdict for the defendant.—*Affirmed*.

H. P. Daly and C. C. Putnam, for appellant.

R. B. Alberson and Carr, Carr & Cox, for appellee.

EVANS, J.—The accident happened in July, 1916. The place of the accident was at a point just west of Sixty-third

Street, Des Moines, such street being the western limit of the city. The plaintiff, at the time of the accident, was an employee of the Standard Oil Company. The Standard Oil Company had acquired a right, under a lease from the defendant company, to erect and maintain an oil supply station upon certain ground of the defendant company which was adjacent to its tracks. Pursuant to such lease, the supply station was constructed and equipped. The ground thus leased by the Standard Oil Company from the defendant was enclosed with a fence, and the structure of the oil company was all included within such enclosure. As a part of the equipment for unloading, two uprights, 6x6, were maintained, close to the fence. At the time of the accident, the plaintiff was engaged in painting these uprights, the taller one being 24 feet high. For the purpose of such work, the plaintiff used an extension ladder. In placing the same, he rested the foot thereof upon the ground outside of the fence, and upon the defendant's right of way, and within 16 or 18 inches of one of its tracks. In so placing the ladder, he admits that he knew that an engine passing over the tracks could not clear the ladder without striking it. He engaged in his work upon such ladder at a height of about 20 feet, and undertook to watch for the approaching trains. He testified that he looked for a train every five minutes, and that he looked more especially toward the east, as the direction from which a train was most likely to come. He had a clear view in that direction along the track for three quarters of a mile. While he was thus engaged at the top of the ladder, one of defendant's trains did come from the east, and did pass over this track, and thereby displaced the ladder, to the resulting injury of the plaintiff. This train was pulled by the switch engine, and comprised 17 cars, heavily loaded with sand and cement. It did not come rapidly nor suddenly. It stopped within a hundred feet of

1. RAILROADS:
accidents on
tracks: con-
tributory neg-
ligence.

plaintiff's place of work. The stop lasted for two minutes, during which the engine was cut off, and proceeded alone. The engineer was on the further side of his cab, and was taking his signals from the rear. The plaintiff testified that, though he was watching constantly for a train, he neither saw nor heard this train, and knew nothing of its approach until it displaced his ladder. On the other hand, none of the trainmen observed the plaintiff, nor did any of them know that his ladder was resting upon the railroad ground.

The argument for plaintiff is that the lease held by the Standard Oil Company required it to keep its supply house painted, and that, therefore, the plaintiff was performing for his employer the requirement imposed by the defendant upon its lessee. It is argued, therefore, that the defendant owed the plaintiff a duty of lookout and discovery. Whether, if this premise were good, such conclusion would follow, we need not determine. The actual provisions of the lease thus relied on by plaintiff were as follows:

"All buildings and structures are to be 'constructed of such material and in such manner as to be satisfactory to lessor.'

"All buildings and the leased premises are to be kept in a neat and orderly condition; the *buildings* to be painted as often as necessary; the color to be designated by the lessor."

The plaintiff was not engaged in painting the buildings.

Such lease contained, also, the following provision:

"No building, structure or obstruction shall be erected or placed nearer than six (6) feet of the nearest rail of any track."

The fence line was six feet from the tracks. The only reason the plaintiff had for putting the foot of his ladder against the defendant's railroad was that it was more convenient for him to do so than to place the same inside the fence. The ground inside the fence was more uneven than that outside. The ladder would thereby be rendered less

secure, unless it were lashed to the upright. He could have lashed the same, but this would have taken correspondingly increased time and trouble.

The argument of the plaintiff centers, in the main, upon two general propositions:

(1) That the question of his contributory negligence was for the jury.

(2) That the question of the negligence of the defendant under the doctrine of last clear chance was for the jury.

In proof of his own freedom from contributory negligence, he testified that he watched and listened constantly for an approaching train, and saw none. And yet the undisputed testimony of his own witnesses, even including himself, is that, if he had looked, he must have seen the train, and, if he had listened, he must have heard it. He argues that the trainmen could have seen him for a distance of three quarters of a mile, and that, therefore, the defendant is liable, under the doctrine of last clear chance. But he could have seen the train more readily than the trainmen could have seen him. If he had seen the train half a mile away, he would have known that he was in imminent danger. Without seeing the train, he knew every moment that he was in imminent danger; whereas, if the trainmen half a mile away had seen him, they would simply have seen him at work within the lines of the enclosure of the Standard Oil Company. They would not necessarily, or even probably, see that his ladder projected into the near vicinity of the track. His presence at such place, therefore, would not attract their observation, or disclose to them his peril. Indeed, his actual position in their line of vision was such as to negative any suggestion of peril. Only the discovery of the ladder itself and the extent of its encroachment upon the right of way could disclose to the trainmen the peril of plaintiff's position.

We have carefully read the evidence in the record, and

we find nothing in it which presents debatable ground. It is needless that we go into its many details. The salient and controlling facts are those already stated. The plaintiff placed his ladder intentionally, conscious, at the time, that he was placing an obstruction in the way of defendant's trains. It was a stealthy obstruction, in that it was not readily observable to trainmen. It was not only an act of trespass; it was reckless and foolhardy, as an act of negligence. It had not the excuse of an emergency. It was not even momentary, but was continued persistently, in the full consciousness of its foolhardy character. No just rule of law could be formulated to protect a man from folly so resolute.

A case of last clear chance is not presented. The evidence on behalf of plaintiff is direct and positive that the trainmen did not discover the plaintiff, nor the obstruction

2. NEGLIGENCE:
last clear
chance: failure to discover.

which he had placed. There is nothing in the circumstances that would warrant the jury to find the fact otherwise. The plaintiff himself was far enough away from the

line of vision of a lookout on the engine. The ladder was a small one. As a visible object, it also was to one side of the track and of the line of vision. It was only at a point close to the ground that it became an obstruction to the passage of trains. The trial court properly sustained the motion to dismiss. Its order is, accordingly,—*Affirmed*.

WEAVER, C. J., PRESTON and SALINGER, JJ., concur.

MARTIN NEWCOMER, Appellee, v. M. C. NOVAK, Appellant,
et al., Appellees.

ELECTION OF REMEDIES: Special Lien Abandoned by Execution Levy. Special claims, or rights in and to personal property by virtue of a mortgage or conditional sale, are wholly waived by

obtaining personal judgment against the debtor *and seizing the property under execution levy.*

Appeal from Jones District Court.—F. F. DAWLEY, Judge.

DECEMBER 16, 1919.

REHEARING DENIED MARCH 12, 1920.

ACTION in equity to foreclose a trust deed, executed April 21, 1913, and duly recorded, April 29, 1913, securing an issue of \$25,000 of bonds of J. A. Green & Sons, a corporation. The appellant, Novak, one of the defendants, answered, claiming a superior lien upon a steam shovel and some dump cars owned by the corporation Green & Sons, which last-mentioned property was included in the trust deed. Claim was that said property was sold and delivered to defendants Green & Sons under a sale contract, providing that the title to the property should remain in the seller until the notes were paid, and that the notes given therefor should be secured by a mortgage on the property; and further, that it was the intent of the parties to said sale contract to retain in the seller a lien on said property until the purchase price was paid, even if title passed to said purchaser. The contract provided that, on breach of the contract, the seller may sue for and recover the amount due on the notes. Novak further alleged that the seller had transferred all rights in the contract and property to him. The answer by Novak further alleged that he had brought action on the notes given for the purchase price, against Green & Sons, and recovered judgment thereon, February 2, 1915; that no part of the judgment has been satisfied; that execution was issued under said judgment, and levy made on the shovel and cars and other property of Green & Sons, but no sale was made or advertised under said levy, because Novak relied on the promise of Green & Sons that, if permitted to retain the property to do its work, it would

make payment of the judgment from its income; that the judgment was obtained in Linn County, and afterwards a transcript thereof was filed in the office of the clerk in Jones County; that, at the time the action on the notes was commenced by Novak, and judgment taken and levy made, Green & Sons, a corporation, was insolvent, but this fact was unknown to Novak or to the party who sold the claim to him. It does not appear that the contract was recorded, and it is not claimed that plaintiff had any notice, actual or constructive, of the provisions of the contract. All the property was sold at execution under plaintiff's judgment for \$2,000 less than the judgment. Plaintiff's demurrer to the answer was sustained. Defendant Novak refusing to plead further, default judgment and decree were rendered against him, the court holding that the plaintiff's lien was superior to any claim on the part of said defendant Novak. The ground of the ruling, as we understand it, was that Novak had waived any alleged lien he might have by virtue of the sale contract, by taking a personal judgment against the corporation, Green & Sons, and levying on the property under execution, and had elected to treat the sale of the property as absolute, and as an abandonment of any claim under the contract. The defendant Novak appeals.—*Affirmed.*

E. A. Fordyce, for appellant.

Deacon, Good, Sargent & Spangler, for appellees.

PRESTON, J.—One of appellant's contentions is that his contract is a mortgage, and not a conditional sale, and that Section 2905 of the Code does not apply. If it is a mortgage, plaintiff had no notice of it. A similar contract has been held to be a conditional sale. Among the cases so holding is *Richards v. Schreiber*, *infra*, at page 433. Appellee argues that whether the contract was a conditional sale con-

tract or a chattel mortgage is immaterial, for that Novak did not claim the property under either a conditional sale contract or a chattel mortgage, but obtained a general judgment against the defendant corporation, and caused a general execution to be levied upon its property. In the *Elevator Co.* case, *infra*, at 726, we said:

"A party holding personal property by virtue of a mortgage or pledge may waive his claim under the mortgage or pledge, and attach the property in a suit to recover the debt for which the mortgage or pledge was given. Such an attachment is, in itself, a waiver of the claim under the mortgage or pledge. The lien created by the latter is essentially different from that created by the attachment, and the two cannot exist at the same time."

We deem it unnecessary to discuss the point as to whether the instrument was mortgage or conditional sale contract, for the reason that we think appellant waived whatever lien or claim of title he might have had, as between the seller and purchaser. Appellee's contention is that, where the seller of property brings suit upon a note evidencing the purchase price of the property, or a part thereof, and obtains judgment thereon and levies an execution upon the property as the property of the buyer, it is an election on the part of the seller to treat the sale of the property as absolute, and as an abandonment of any lien thereon. On this they cite *Richards v. Schreiber*, 98 Iowa 422, 433; *Kearney Mill. & Elev. Co. v. Union P. R. Co.*, 97 Iowa 719, 723; *Whitney v. Abbott*, 191 Mass. 59 (77 N. E. 524); 35 Cyc. 673. In the *Richards* case, *supra*, under a similar contract and situation as here presented, the court said:

"A further objection to a recovery of this property by the Staver & Abbott Manufacturing Company, of which other creditors may avail themselves, is the fact that, at the October term, 1893, of the Calhoun County district court,

that company brought an action for the recovery of the price of the property, aided by attachment. The petition in that action averred that Ehrlich and Eadie * * * owed the plaintiff about \$4,000 for goods sold. The writ of attachment was levied on real estate of Ehrlich, and Richards was garnished under it. * * * The suit and proceedings thereunder were an unequivocal election by it to waive any right it may have had to recover the property as its owner, and to treat it as sold absolutely to Ehrlich."

In the *Elevator* case, supra, we said, quoting from *Thompson v. Howard*, 31 Mich. 309, 312:

" 'A man may not take two contradictory positions; and, where he has the right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge, or means of knowledge, of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again.' * * * 'The election, if made with knowledge of the facts, is in itself binding. It cannot be withdrawn, though it has not been acted upon by another by any change of position.' "

We think these cases are in point. Appellant says further that judicial proceedings not prosecuted to final results, but abandoned, will not constitute an election. We do not understand the record in the instant case to show that there was any abandonment by Novak. He prosecuted his case to judgment, and levied upon the property. The record does not show that the levy was abandoned, but that he permitted Green & Sons to use the property, under the promise to pay the claim. Appellant cites *Buffalo C. L. & I. Co. v. Swigart*, 176 Iowa 422, 428. In that case, the plaintiff first filed a petition asking the foreclosure of a mortgage for principal, interest, and taxes paid. On demurrer, the petition was held bad. Then plaintiff filed a substituted petition, in

which he did not ask the foreclosure of the principal. Later, he filed a second amended or substituted petition, asking foreclosure for principal, interest, etc. *Held* that the first petition was not a waiver of a right to file the second, and was not an election to proceed solely for the items other than the principal. The court said that there was but one ultimate claim in the case, and but one judgment, and no waiver of whatever remedies plaintiff was entitled to under the pleadings and the testimony adduced in support thereof.

We think the trial court properly sustained the demurrer, and the judgment is, therefore,—*Affirmed*.

LADD, C. J., EVANS and SALINGER, JJ., concur.

SUPPLEMENTAL OPINION.

PER CURIAM.—On rehearing, our attention is called to *Stein v. McAuley*, 147 Iowa 630. That case does not refer to prior Iowa cases apparently in conflict. We do not, at this time, approve or disapprove of the *Stein* case. That case is distinguished on the ground that, in the instant case, there was a conditional sale. Petition for rehearing is overruled.

R. H. SIETSEMA, Appellant, v. ANDERSON et al., Appellees.

DAMAGES: Nonfraudulent Failure of Consideration. The non-fraudulent failure of consideration, following an exchange of properties, is compensated by returning to the injured party the value of that which he paid for that which he did not receive, and, perhaps, expenses reasonably incurred. Especially is this the proper measure when the pleadings were framed on such theory.

PLEADING: Amendments—Belated and Inconsistent Amendments.

- 2 Amendments bearing on the measure of damages, and offered at the close of movant's evidence, are properly rejected (1) when they do not enlarge the measure of damages, and (2) when they are contradictory of record stipulations.

Appeal from Emmet District Court.—N. J. LEE, Judge.

MARCH 12, 1920.

ACTION for damages for a failure of the consideration in an exchange of property between plaintiff and defendant. At the close of plaintiff's evidence, there was a directed verdict for the defendant. The plaintiff appeals.—*Affirmed.*

Francis & Owen and Cosson & Francis, for appellant.

Morse & Kennedy, for appellees.

EVANS, J.—I. Though three defendants are named, the suit is pressed only as against the defendant Anderson. On February 23, 1917, the plaintiff and defendant Anderson entered into an oral contract for exchange of property. The plaintiff was the owner of certain letters patent under which, and a little factory in which, he had manufactured dish pans and fly catchers. The factory had not been a going concern, however, for nearly a year. He traded his letters patent and his factory to the defendant, and received in exchange therefor a purported warranty deed to a quarter section of land in Texas. The deed purported to be executed by the owner, as grantor, but no grantee was named therein. The idea of both parties was that the plaintiff could have his own name inserted as grantee. The plaintiff turned over to the defendant the keys to the factory and the letters patent. The tangible property seems to have been 360 dish pans and 1,500 fly catchers. There was also considerable raw material, including some hundreds of partly constructed pans. The fact came to light later that the purported signature to the blank deed was a forgery, whereby the consideration moving to the plaintiff wholly failed. Upon the discovery of the fact of forgery, the de-

1. DAMAGES:
nonfraudulent
failure of con-
sideration.

fendant at once restored to the plaintiff the property received from the plaintiff, by delivering to him the letters patent and the keys to the factory. That the defendant attempted to make such restoration is not denied; but the plaintiff avers that he did not accept such restoration, but returned the keys and the patent back to the defendant. A few months later, this suit for damages was brought.

The trial of the case in the lower court turned upon one question, namely: What was the proper rule of measure of damage, under the undisputed facts in the case? Counsel for plaintiff contended that the measure of his damage was the value of the Texas land. The trial court held that the rule applicable to the facts, as a measure of damage, was the value of the consideration paid by plaintiff. Plaintiff declined to offer any evidence of the value of such consideration. There was, therefore, a directed verdict for the defendant at the close of plaintiff's evidence. In the introduction of testimony, it was stipulated into the record that the defendant was innocent and ignorant of the forgery, and had acted in good faith. No question of fraud or bad faith, therefore, was involved.

It is now urged on appeal that the holding of the court on this question was erroneous, and that it was based upon an antiquated case of *Foley v. McKeegan*, 4 Iowa 1. The holding of the trial court was clearly correct. Two reasons appear upon the face of the record, either one of which would be sufficient to sustain the holding.

The first is that plaintiff's petition was cast in a mold that called for precisely that measure of damage. It averred that the consideration paid to the defendant for said land was \$5,000, and that the plaintiff paid such consideration in reliance upon the title of the defendant. The prayer for judgment was for \$5,000.

It is true that the petition averred, also, "that said premises were, in fact, of the reasonable value of the agreed

consideration therefor, to wit: \$5,000." There was no other allegation in the petition purporting to claim as damages the value of the Texas land, except as such value was measured by the value of the consideration paid.

Secondly, it is the recognized rule in this state, as between a vendor and a vendee of real estate, that, in the absence of wrongful intention or bad faith, a failure of vendor's title which renders him unable to perform, is a failure of consideration. In such case, the vendee must be made whole; but the punitive elements of damage are eliminated. Ordinarily, the measure of damage is the consideration paid, and, perhaps, expense reasonably incurred. It is true that this rule had its origin a long time ago, in *Foley v. McKeegan*, 4 Iowa 1. But it has been applied frequently from that time to the present. *Eggert v. Pratt*, 126 Iowa 727, 728; *Cornell v. Rodabaugh*, 117 Iowa 287; *White v. Harvey*, 175 Iowa 213. This rule is consonant with the rule of measure of damage for breach of a covenant of title in the conveyance.

If a conveyance has been made with covenant of title, the vendee may sue on the covenant. If conveyance has not been made, he may sue on the contract. His measure of recovery is the same in either case.

II. At the close of the evidence, and while the motion for a directed verdict was under the consideration of the court, the plaintiff presented an amendment to his petition, and asked leave to file the same. Leave was denied, and this ruling is laid as one ground of reversal.

2. PLEADING :
amendments :
belated and in-
consistent
amendments.

One feature of the amendment was, in effect, to sue upon the covenants of warranty in the purported deed. If this amendment had been permitted, it would not have opened the door to a greater recovery for the plaintiff than the value of the consideration paid. This measures the limit of the warrantor's liability.

Mischke v. Baughn, 52 Iowa 528; *Royer v. Foster*, 62 Iowa 321; *Boice v. Coffeen*, 158 Iowa 705.

The plaintiff was not prejudiced, therefore, at this point. Furthermore, it is by no means clear that he could have predicated an action at law upon covenants of a warranty contained in a deed concededly forged and void, to which neither plaintiff nor defendant was an actual party. Doubtless, equity could find a way of appropriate relief in such a case. The cases relied on by appellant, whereby the covenants of a deed, blank as to the grantee, were enforced against the vendor, whose name did not appear in the chain of title, were equity cases. *Santee v. Keefe*, 127 Iowa 128; *Bossingham v. Syck*, 118 Iowa 192.

Whether such relief would be possible in an action at law, *quaere*. We do not pass upon it. A further feature of the offered amendment was an allegation of fraud on the part of the defendant. This was a contradiction of the stipulation already entered of record. It was clearly within the discretion of the court to refuse so radical a change of issue after the evidence had closed. We find no error in the record. The judgment below is, accordingly,—*Affirmed*.

WEAVER, C. J., PRESTON and SALINGER, JJ., concur.

STATE OF IOWA, Appellee, v. MAJOR COOK, Appellant.

BURGLARY: Inferring Intent. Intent to commit larceny may not
1 be inferred from the defendant's admission that he "tried" to enter a dwelling house.

CRIMINAL LAW: Confessions Involve All Elements of Crime. Ad-
2 missions of the truth of facts not in themselves sufficient to constitute the alleged offense, are not a *confession*. So held where the accused simply admitted, under a charge of attempted burglary, that he "tried" to enter the house, but made no admission, directly or indirectly, as to any felonious intent.

CRIMINAL LAW: Confession—Insufficient Evidence of Corpus Delicti. A confession will not justify a conviction for attempted burglary, when the evidence of the *corpus delicti* shows an intent, but no attempt, to break and enter.

Appeal from Monroe District Court.—SENECA CORNELL,
Judge.

MARCH 12, 1920.

THE defendant was indicted, tried, and found guilty on charge of attempting to break and enter a dwelling house in the nighttime, with intent to commit larceny, and from this judgment he appeals.—*Reversed.*

Price & Hickenlooper, for appellant.

H. M. Havner, Attorney General, and *C. W. Lyon*, Assistant Attorney General, for appellee.

WEAVER, C. J.—The indictment charges that, on August 5, 1919, and in the nighttime, the defendant unlawfully attempted to break and enter a certain dwelling house occupied by one Messer and family, in the city of Albia, with intent to commit larceny. The evidence shows without dispute that the building mentioned was then being used by Messer and wife as a residence, and that they owned and used therein more or less household and kitchen furniture. They also had a small amount of money. The night was warm, and the outside door, opening into the house from the porch, had been left unclosed; but the doorway was filled by a screen, hooked on the inside. Messer and wife were sleeping in an inner room, the open door to which was in direct line with the outside door to the porch entrance. Sometime after midnight, Mrs. Messer, lying upon her bed, and facing the door, was awakened by a flash of light thrown on her face. Waking, she saw a man standing on the porch, just outside the screen, apparently holding a

1. BURGLARY: inferring intent.

flashlight at or near the point where the screen was hooked to the door post. The woman screamed in fright, and the intruder left. She does not claim to have recognized him, Messer was aroused by the cry of his wife, but not in time to see the person at the door; and the most he says is that he heard a man walk off the porch. Two or three days later, the sheriff arrested defendant in Kansas City. As a witness, he says that, after he had brought him to Albia, and placed him in jail, defendant expressed a wish to see the county attorney, and "tell the truth." An interview was then had between defendant and the county attorney and the sheriff. What was there said is shown by the testimony of the sheriff only, and is as follows:

• "In the conversation, he stated to the county attorney what he did that night. He said, if we would take him down the street, he would show us the house that he attempted to get into,—he was at. He said he was at the M. & St. L. tank, and left and came up the street. After that, we took him where he indicated he wanted to go. We took him in my auto. We afterwards picked up Mr. Shaw. We started from the county attorney's office, and went east on Benton Avenue to Giltner's corner in the city of Albia, Iowa. Mr. Cook said, if we would go down to that water tank down east, and let him come back this way, he could show us the place better than he could to start from this end. Coming back in the street, Mr. Vade Shaw, the county attorney, myself, and the defendant were in the car. I know where the Otto Messer house is now; I did not then. We stopped at the Messer house, and he said, 'That is the house.' He stated that he had tried to get into that house, but that he was scared away by someone's hollo or scream. He said it was about 3:30 o'clock, as nearly as I can recollect. We stopped at the Messer house. I then took him back to the jail."

Mr. Shaw, who accompanied the party in the auto, cor-

roborates the sheriff's version of what occurred, saying:

"I got in the car and drove out east, near Mr. Giltner's place, then turned around, and drove back west on Benton Avenue. While coming back, the defendant had a conversation with Mr. Dearing in my presence. Yes, I heard the conversation in which he stated that he had tried to enter, and he indicated the houses. Following that, we drove westward along the street. When we got up to the Otto Messer house, he pointed out that house, and said, 'I was at that house, and tried to get in.' I do not know that he said he was in that house. He said he was up to the door, and someone halloed, I believe he said, and scared him away."

The foregoing constitutes the entire evidence in the case, and is quoted literally from the printed record. No evidence was offered on part of the defendant.

I. When the State had rested, the defendant moved for a directed verdict in his favor. The motion was overruled. It should have been sustained. That the evidence is insufficient to support a conviction is easily demonstrable on several grounds.

In the first place, to sustain a conviction, it must be shown, by evidence beyond reasonable doubt, not only that defendant did attempt to break and enter the Messer residence, but that such attempt was made with the intent of committing larceny. No witness testifies to a fact or circumstance tending to show the alleged larcenous intent. A man laying hold of the door of a dwelling in the nighttime may, of course, be a burglar, intent on larceny; he may be a lecher, intent on gratifying a degraded passion; he may be a tramp, intent only on shelter, or place to sleep; or he may be a drunken derelict, incapable of any conscious intent. In either event, he is, of course, a trespasser; but proof of the fact of his approach to the house, or of his attempt to enter, and no more, has no tendency to prove

that the trespasser intended to commit larceny. See *State v. Bell*, 29 Iowa 316. In the cited case, as in the one at bar, the defendant was convicted upon a charge of breaking and entering a dwelling house in the nighttime, with intent to commit larceny. It was there held that the intent to commit larceny "is one essential element, and without it the offense would not be complete." In the same opinion, it is further said:

"The law does not imply the intent in cases of this kind, from the act of breaking and entering, or entering without breaking."

See, also, 9 Corpus Juris 1030. It is true that the intent may be, and usually must be, established by circumstances, rather than by direct evidence; but it cannot be inferred from the mere attempt to break and enter.

In this case, the intent necessary to constitute the offense charged is left by the State to mere conjecture. It does not appear that anything was stolen or carried away from the Messer home, on the occasion in question, or that there was a word said by the accused, or thing done by him at the time, from which direct or necessary inference may be drawn that he intended to take, steal, or carry away any of the goods or property owned or kept in the building. The State bases its claim for an affirmance of the conviction upon an alleged "confession" made by the appellant. The only evidence, and all the evidence, of such confession that we have is in the matter we have already quoted in full, and it contains not a word of confession or admission of the felonious or unlawful intent, without which there can be no conviction under an indictment for an attempt to commit burglary. The sheriff's story of the circumstances under which the admission, if any, was made, is that the party having the defendant in custody drove to the neighborhood of the Messer home; that they stopped at the house, and defendant said, "That is the house;" that

he tried to get into that house, but was scared away by someone's "holler" or scream. The witness then adds:

"He said it was about 3:30 o'clock, as near as I can recollect. I then took him back to the jail."

The only other witness, Shaw, testifies to no more than is stated by the sheriff.

Giving the utmost allowable effect to these statements by the defendant, they show nothing except that he tried to get into the house. How he tried, or what he did, if anything, to effect an entrance, is in no manner shown or described; and the unlawful motive or intent, without which there was no crime committed, is not so much as mentioned or hinted at. This defect in the State's case is alone sufficient to necessitate a reversal of the judgment appealed from.

II. The State, as we have said, relies upon the defendant's alleged "confession," to support the verdict of guilty. This position is untenable, for two sufficient reasons: First,

there is no evidence of any "confession," in the legal meaning of that word; and, second, if the statements attributed to the defendant be treated as a confession, it is still insufficient to sustain a conviction, under our statute, Code Section 5491, which provides that:

"The confession of the defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that the offense was committed."

A confession is an admission or acknowledgment of guilt of the very offense charged. It may be made by the statement of the accused when confronted with the charge, or when speaking of the alleged crime, saying, in substance or effect, "I am guilty," or "I acknowledge the truth of the charge;" or, as some authorities hold, by his admission of the essential facts constituting such crime. But an admission of the truth of facts not, in themselves, sufficient to

constitute the alleged offense is not a confession of guilt, although it may be admissible as evidence in support of the charge. The defendant's admission, as we have seen, consists simply in pointing out the house, saying, in substance:

"That is the house. I tried to get in, but was frightened away by the woman's scream."

Under the rule stated, and under all the authorities, his admission that he tried to enter the house, unaccompanied by any direct or indirect admission, or by other circumstantial evidence of an intent to commit larceny, is not a confession, nor is it evidence from which, in the absence of other inculpatory circumstances, the existence of such intent can properly be drawn by the court or jury. *State v. Red*, 53 Iowa 69, 74; *State v. Knowles*, 48 Iowa 598; *State v. Glynden*, 51 Iowa 463; *State v. Abrams*, 131 Iowa 479; *State v. Heidenreich*, 29 Ore. 381; *Shelton v. State*, 144 Ala. 106.

The decision of this court in *State v. Knowles*, supra, is directly in point. The defendants therein being on trial on charge of forgery, the State offered in evidence statements or admissions by the accused, to the effect that he wrote the alleged false signature. Such statements were treated by the trial court as confessions. This we held to be error. It is there said, in reversing a conviction:

"A confession implies that the matter confessed is a crime; and, unless the defendant admitted that he wrote the name, Daniel Slack, to the note *with a fraudulent intent*, his statement was not a confession, because he may have intended such confession to imply that the act was done rightfully."

But, as we have already suggested, even if we were to concede that a confession was proved, it will not sustain a conviction, under the statute quoted, which provides that a

3. CRIMINAL LAW :
confession : in-
sufficient evi-
dence of corpus
delicti.

confession will not warrant a conviction, without other proof that the alleged crime was committed by someone. In other words, to sustain the conviction of the appellant, the State must be able to point to some testimony in the record, wholly independent of the statements of the defendant, upon which the jury could properly find that, at the time and place mentioned in the indictment, some person attempted to break and enter the Messer residence, with intent to commit larceny.

In this respect, the record reveals a fatal lack of evidence. Independent of the alleged confession, the testimony goes no further than to show that, on the night in question, some person appeared upon the porch of said residence, and flashed a light through an open door, protected by a wire screen, thereby arousing the housewife from her slumbers, and causing her to scream in fright; whereupon, he turned away, and disappeared. No one, either then or on the trial, pretends to have recognized him, or attempts now to identify him. There is no evidence that the screen door was opened by the trespasser, or that he attempted to open it; or laid hands upon it. The most that the woman says, having any possible bearing in that direction, is that:

"The flashlight was right where the screen hook was; he had it pointed toward the screen where the hook was."

This testimony may be entirely true, and yet be also consistent with the theory that the stranger did no more than explore the situation, to ascertain, possibly, the feasibility of an entrance, but had not yet opened or attempted to open the screen. Proof tending to show *intent* to break and enter, and no more, will not support a finding of an *attempt* to break and enter. And here we meet again the insuperable objection that, even if the person prowling about the door of this building did have it in mind to open the door and enter, there is no showing of any kind upon

which the alleged intent to commit larceny can be predicated or inferred.

It would be a dangerous precedent to permit this conviction to stand. It may be, and perhaps is, true that the accused is an undesirable citizen, of whose presence the community would be glad to be relieved; but every accused person, without respect to his general merits as a citizen, has the right to insist that no judgment shall be entered, depriving him of life or liberty, except by due process of law, and upon competent and sufficient evidence of his guilt of the very offense with which he stands charged.

For the reasons stated, the judgment of the district court is—*Reversed*.

EVANS, PRESTON, and SALINGER, JJ., concur.

PRESTON, J. (concurring). I concur in the reversal. I would qualify somewhat the language in Paragraph I of the opinion, in regard to proof of intent, because of the use which may be made of it as a precedent. As I understand it, the breaking and entering is the gist of the crime of burglary, or breaking and entering. It is necessary, of course, that there must also be an intent to commit a public offense. So it is when the charge is an attempt. In such cases, intent is difficult to prove. A person might break and enter, and be apprehended in a building or frightened away before he had said or done anything to indicate his intent. A burglar has some intent in breaking and entering the building of another. Usually, it is for gain. In the absence of circumstances indicating some other intent, I think it should be presumed that the breaking and entering is with intent to steal. We have, I think, so held. In one case, we went so far as to say, in effect, that the inference or presumption, with other circumstances, is so strong as to sustain a conviction, even as against evidence tending to show another intent. *State v. Worthen*, 111 Iowa 267;

State v. Fox, 80 Iowa 312; *State v. Teeter*, 69 Iowa 717; *State v. Mecum*, 95 Iowa 433. The *Worthen* case has never been overruled or questioned, and is the last pronouncement on the subject.

**APPEAL OF MILL OWNERS MUTUAL FIRE INSURANCE
COMPANY.**

TAXATION: Nontaxable Surplus Insurance Fund. The funds of a nonstock and nondividend paying mutual fire insurance company are not locally assessable when such funds are accumulated by collecting excess premiums in advance, and, at the termination of the policy, and in accordance therewith, returning to the policyholder the excess over and above the cost of insurance.

Appeal from Polk District Court.—HUBERT UTTERBACK,
Judge.

MARCH 15, 1920.

In the district court, this was an appeal from an order of the city council of Des Moines as a board of review, whereby such board confirmed an assessment against the appellant of \$461,381. The district court confirmed the action of the board of review. From such order of the district court, the taxpayer has appealed.—*Reversed.*

Henry & Henry, for appellant.

H. W. Byers, Reson S. Jones, C. A. Weaver, and Paul Hewitt, for appellee.

EVANS, J.—The Mill Owners Mutual Fire Insurance Company, appellant herein, is a mutual fire insurance company, which insures the mill and elevator property of its own members only. It has no capital stock, and pays no dividends as earnings. It does, however, return to its pol-

policyholders a pro rata part of advanced premiums collected from them. The amount of premium so returned is usually denominated upon its books, for want of a better term, a dividend. Theoretically, it pays all its losses by a prompt assessment pro rata upon all its members. As a practical fact, however, such method would result in great delay in the settlement of losses. In order to avoid such delay, and to enable it to make prompt adjustment of losses, it collects in advance from each person becoming a policyholder an estimated premium, based upon the prospective cost of insurance contracted for. It assumes to hold this premium in trust, and to pay therefrom the amount of the member's assessment, in advance of its actual collection. The amount of the assessment, when actually collected, goes into the same premium fund, to fill up the depletion caused by the advance payment. That is to say, the assessments for losses are made regularly, regardless of the premium fund, and the premium fund is maintained by its constant replenishment from the collection of the successive assessments, and of premiums from new members. Under the plan in vogue, it is intended to maintain the premium fund without substantial impairment, as long as the company is a going concern. Its immediate benefit to the policyholders is the accruing interest thereon, and the grace of the time which it permits in the collection of assessments. It also operates as an equalizer of the assessments, in that it enables uniform rates of assessments to be maintained, even though excessive losses may be temporarily sustained. The company is carrying \$30,000,000 of insurance for its members. This premium fund represents a sort of working balance and quick assets for the payment of losses. It also represents a reserve, for the payment of extraordinary losses. For such losses, it is subject to call to its last dollar. On its face, the sum total looks large, as a part of the working machinery to be constantly maintained. Reduced, however, to lower

terms, it means that, for every \$30,000 of insurance carried, a working fund of \$461 is maintained.

One form of policy used by the company provides for a term insurance of one year. The estimated cost is paid in advance, as a premium. At the expiration of the term, the actual cost of the insurance is charged against the premium account of the policyholder, and the balance of his premium is returned to him. This return to the policyholder is called a "dividend." The larger part of the insurance carried by the company is on this form of policy. In the event of liquidation of the company, all of this premium fund would be distributed to the policyholders, pursuant to their policies. The president of the company testified as follows:

"The interest upon the two funds, the 'permanent fund' of \$100,000 and the 'cash surplus over and above the permanent fund' of \$361,381.05, all tends to cut down the assessments which will be made upon all members of the company to meet losses and expenses; and, if the policies were wound up today, and the company went out of business, the policyholders would get all of that money."

The foregoing is, perhaps, a sufficient statement of facts to enable a consideration of the legal question presented to us. This question is whether, under the provisions of Section 1333-c, Code Supplement, 1913, this fund is exempt from local assessment. Prior to its amendment by Chapter 258, Acts of the Thirty-seventh General Assembly, this section of the Code was as follows:

"Sec. 1333-c. In assessing for taxation the moneys and credits of every insurance corporation, company or association organized under the laws of this state, except county mutual and fraternal beneficiary associations, which county mutuals and fraternal beneficiary associations are not organized for pecuniary profit, the assessor shall ascertain the debts or liabilities, if any, of such corporation, company

or association to its shareholders or other persons, which debts and liabilities shall be deducted, as provided in Section 1311 of the Code, but in ascertaining the indebtedness or liability of such corporation, company or association, a debt shall be deemed to exist on account of its liability on the policies, certificates or other contracts of insurance issued by it equal to the amount of the surplus or other funds accumulated by any such corporation or association, [pursuant to law, its contracts of insurance or its articles of incorporation] for the purpose of fulfilling its policies, certificates or other contracts of insurance, and which can be used for no other purpose."

Chapter 258, Acts of the Thirty-seventh General Assembly, amended the foregoing by eliminating therefrom that portion thereof which we have included in brackets. We had occasion to construe this section before it was amended in *Chicago Life Ins. Co. v. Board of Review*, 131 Iowa 254. In that case, we held that a certain fund accumulated as a surplus would not come within the exemption provided by this statute. The amendment by the thirty-seventh general assembly was undoubtedly an attempt to enlarge the scope of exemption, and to meet the criticism or differentiation made in the cited case. It is argued for the appellee that the amendment was not effective for that purpose, because not enough of the language of the section was eliminated to accomplish such purpose. Unless the amendment is effective for such purpose, then it must be said to be wholly without meaning. We should be slow to put such a construction upon it. Clearly, this is a fund which the association has accumulated "for the purpose of fulfilling its policies, certificates, or other contracts of insurance." Is it a fund "which can be used for no other purpose?" To dissipate this fund except for the purpose of its accumulation would be a breach of the contracts of insurance.

It does appear that the fund can be drawn on for current expense, but this also is pursuant to the contract of insurance. The contracts of insurance contemplate the current expense as a part of the cost of insurance. But the fund is already diminished by the full amount of current expense already paid. The present fund is not charged with liability for future expense. If we should deem the association to be liquidated today, the sole liability chargeable upon this fund would be that to the policyholder.

True, while the association continues as a going concern, the component parts of the fund are continually changing. New premiums and assessments are collected; current expenses are paid from these as they accrue; and the residue finds its ultimate place in this fund.

It is the clear policy of the statute to exempt from local assessment the funds of an insurance association which are held for the benefit of policyholders in fulfillment of their contracts of insurance, and which are not an accumulation of earnings or profits accruing for the benefit of mere owners or stockholders of the company.

The fact that this association has no capital stock, and, therefore, has no stockholders or owners, and no beneficiaries except its policyholders, furnishes a persuasive reason why it should be deemed to come fairly within the terms of the exemption provided in this statute.

We reach the conclusion that the statute is applicable.

The conclusion thus reached renders it unnecessary that we consider the question of exemption of that part of this fund invested in government bonds.

For the reason indicated, the judgment of the district court must be and is—*Reversed*.

WEAVER, C. J., PRESTON and SALINGER, JJ., concur.

G. W. BRYAN, Appellant, v. ALFRED CHRISTIANSON et al.,
Appellees.

JUDGMENT: **Conclusiveness—Adverse Possession.** One may not, in an action involving title to real estate, set up a claim of title by adverse possession already adversely adjudicated against him, even though claimant has been long in possession since such adjudication.

Appeal from Hamilton District Court.—H. E. FRY, Judge.

MARCH 15, 1920.

THE nature of the action, the issues, and the decision, as stated by appellant, and which appellees concede to be correct, are stated thus:

“This is a suit in equity, to restrain the defendants from entering on the plaintiff’s land and destroying his fences and obstructing the free use thereof by the plaintiff. A temporary injunction issued.

“The plaintiff claims to be the owner of the east half of the west half of Section 15 in Township 88, Range 23 West of the 5th P. M., Iowa, and has been in the absolute, peaceful, adverse, and undisturbed possession of the same, and every parcel thereof, for more than 18 years last past, continuously, under claim of right and color of title; that, during his possession, he has constructed fences and made valuable improvements on said land; that defendants have threatened and are about to enter upon the said premises and cut down the fences surrounding said land, and they are attempting to erect another fence upon the land; that said fence will be placed on plaintiff’s land, if erected, and over his growing crops, and cause him irreparable injury, and plaintiff will be deprived of the free use and possession of his land. That, unless prevented by the mandate of this court, the defendants will enter upon plaintiff’s premises,

and will destroy his fences and growing crops thereon, and deprive the plaintiff of the possession of a portion thereof, and plaintiff is without adequate remedy at law.

"Wherefore, he asks a writ of temporary injunction, to restrain defendants and each of them from entering on the premises or destroying plaintiff's crops, and from erecting any fence thereon, or obstructing or interfering with the plaintiff's free use and possession of the premises or any part thereof, and that, upon final hearing, said injunction be made perpetual, and for such other relief as may be found equitable in the premises.

"The defendants filed an answer and cross-bill, containing a general denial, and stating that the defendants Hoyer and Schulze are, subject to a contract of sale to defendant Christianson, the owners in fee of certain premises specifically described, setting out in detail a chain of title, and claiming that the plaintiff is a trespasser on said land. They also plead prior adjudication.

"They ask that they have a writ of injunction against the plaintiff from interfering with the possession of the defendants; they ask a decree quieting title in them, and damages in the sum of \$1,000 for the use of said land. [Appellant says that the plaintiff filed a reply, denying the allegations of the cross-bill, but we do not find it in the abstract.]

"The court dismissed the plaintiff's petition at his costs, and held that defendant was entitled to a decree quieting his title against the plaintiff on his cross-bill, and also that defendant have judgment against the plaintiff for the rental value of the land for three years, amounting to the sum of \$289.68."

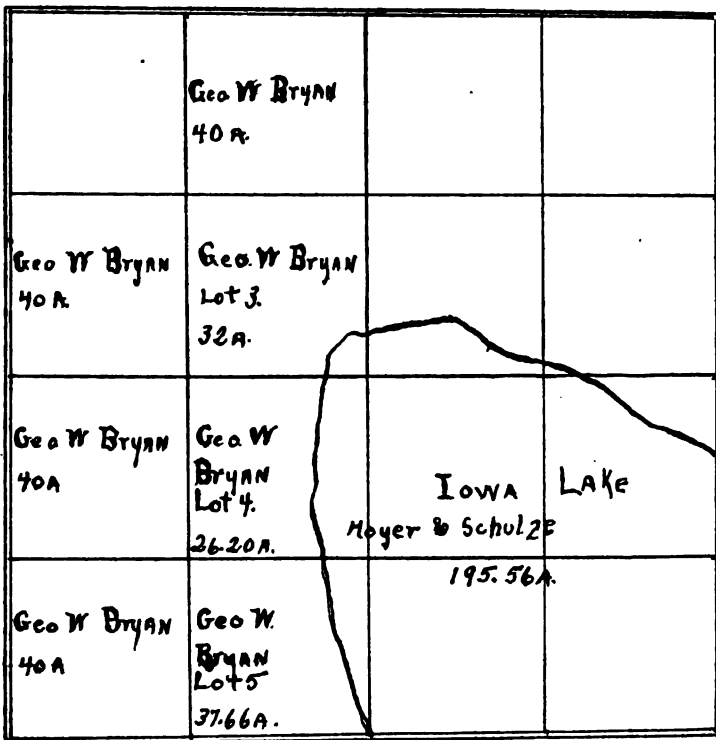
The plaintiff appeals.—*Affirmed.*

D. C. Chase, for appellant.

Burnstedt & Hemingway and *Burnquist & Joyce*, for appellees.

PRESTON, J.—Defendants offered in evidence the plat of the land, as shown in the government plat book, which we here insert for a better understanding of the situation, and to avoid attempting a description. The plat shows Section 15.

Section 15



One feature of this case was before this court in *Carr v. Moore*, 119 Iowa 152. The plaintiff here was a party plaintiff in that action, and, so far as plaintiff is concern-

ed, both cases cover the same land. That case is relied upon by defendants as an adjudication against the plaintiff herein, and they state that it was there held that plaintiff had no color of title or claim of right to the land now in controversy, as a basis for his claim of adverse possession. That action was brought in 1899 against Moore, then owner of Iowa Lake, plaintiff claiming to be the owner of the 24.14 acres necessary to square out his Lots 3, 4, and 5, into 40-acre tracts, and also claiming to be the owner of the disputed land, because of the recession of the waters of Iowa Lake, and because of the long possession of the claimed land by plaintiff. He asked to have the title to the land quieted in him, and for general equitable relief. The circumstances of that case will be referred to as briefly as may be, without repetition.

In 1896, plaintiff Bryan received title by deed to Lot 3, and in 1887, he received title by deed to Lots 4 and 5, all in the west half of said section. The plaintiff seeks in this action to take enough land from the bed of Iowa Lake to square out his lots into 40-acre tracts. The amount necessary to accomplish this is 24.14 acres. Iowa Lake is not, and, at least for a great many years, has not been, a lake. It is described in the case cited. The patent to the land was given to Hamilton County, in December, 1904. In February, 1896, it was conveyed by the county to Long, and the record title was in defendants at the time of the trial, by deed executed and recorded in October, 1915. During the time, until the defendants became the owners of the land in controversy, it was used very little for farming purposes, because of lack of drainage. Its previous owners were non-residents, for the most part, and paid little attention to the boundaries of the lake. The contiguous owners fenced in and used such parts of the lake bed as they desired. According to the evidence, it was used haphazard, because no one else was using it. The land was placed in a drainage

district in recent years, and the defendants have made costly and extensive improvements on the land in the way of drainage. The drainage ditch ran through a part of the 24.14 acres, and plaintiff ran a 10-inch tile to this ditch, with two branches of tile that lay partly on this land, at an estimated cost of about \$100; but the tile was not sufficient to dry out the 24 acres, according to plaintiff's testimony. Defendants at first requested plaintiff to move back his fence to the government meander line, which they had resurveyed, and then served him with notice to remove; and then plaintiff brought this action, to restrain them from molesting him.

In 1898, one Scott, the then owner of Iowa Lake, gave a mortgage which covered the land in controversy, which mortgage was foreclosed by the bank in 1905. McMahon, who had, prior to the foreclosure suit, become owner of the land, subject to the mortgage, was made a party defendant to the foreclosure suit, as was also the plaintiff in this case. Plaintiff was personally served with notice, and did not appear. The decree cut off the rights of plaintiff, and foreclosed the mortgage. The land was sold, under the decree, to the bank, in satisfaction of the judgment, and, in December, 1906, that being the last day of redemption, McMahon redeemed. Plaintiff did not offer to redeem. Plaintiff maintained two or three wire fences on posts around this land, but put in no woven wire fences, as did his neighbor, Dwyer. There were no partition fences around the lake. Plaintiff did not pay, or offer to pay, any of the general or special taxes on the 24.14 acres. The land was assessed \$10 an acre drainage tax, and had been sold therefor, and was redeemed by McMahon in 1913. The plaintiff's claim is based, as he puts it, on the thought that any property owner along the lake had a right to square out his land, and claim enough of the lake bed to do so. He says that, since the decision of the *Carr* case, he had never received any

title to this land from anybody, and that he never claimed that he had any. At the time of the trial, plaintiff had been using the land in controversy about 30 years, and, during part of that time at least, it had been fenced in the manner before stated. Part of the fence is woven wire, which has been there 5 or 6 years, and the woven wire fence is between Dwyer and plaintiff. Plaintiff says the description of every acre of his land adjoining the lake was referred to as government lots, and that, when he bought, it was described as fractional 40's and government lots.

"Q. You thought, along with others, you had a right to square out your 40 into the lake bed? A. Yes, sir. Q. That is what you base your right on here, isn't it? A. That and the possession. I thought I could square out my 40's regardless of the rights of anyone."

He testified that the rental value of the land for the years 1916, 1917, and 1918, was \$4.00 or \$5.00 an acre. Plaintiff does not claim that he has, or that he ever had, any color of title, so that we need not consider that question. He does claim that he had a claim of right, and that he occupied the property adversely under such claim. We pointed out, in *Goulding v. Shonquist*, 159 Iowa 647, that there must be some claim of right or title or interest in the property by which the possessor, in good faith, supposes he has a right to the property, as a basis for adverse possession. It is not necessary that the claim of right be a valid and legal one. It may be that plaintiff's claim, as originally made, that he thought he had a right to square out his 40-acre tracts from the lake bed, would be a sufficient claim of right upon which to base a claim of title by adverse possession, after occupancy for a sufficient time; but we deem it unnecessary to enter into any extended discussion of the question of adverse possession and claim of right, for the reason that, under the record, it is quite clear that plaintiff's

right, or claim of right, whatever it was, originally, was cut off and foreclosed against him in the *Carr* case, brought in 1899, as well as by the subsequent decree and adjudication in the foreclosure case, and all the proceedings. In the *Carr* case, plaintiff made the same claim of right that he now makes, and the additional claim that he was entitled to this strip by accretion or reliction; and such claims were adjudicated against him. Plaintiff testifies that he has no other claim, and no claim at all, arising since the determination of the *Carr* case. We think he may not now assert his title by adverse possession, based upon any claim or right which arose prior to that suit, which was adjudicated against him. Appellee cites *Center v. Cady*, 184 Fed. 605, and *May v. Sutherlin*, 41 Wash. 609 (84 Pac. 585), to the point that one who holds property contrary to and in defiance of a judgment of a court of competent jurisdiction is without color or claim of title, and that good faith is wanting.

There is some suggestion in argument that plaintiff ought to be protected under the Occupying Claimants' Act, and that the doctrine of acquiescence in division fence cases applies. The case seems not to have been tried on either of those theories. Plaintiff is not claiming for the value of improvements. The Occupying Claimants' Act provides a special remedy, and one seeking to avail himself of it must bring himself within the statute, and pursue the course there indicated. *Lindt v. Uihlein*, 116 Iowa 48, 56. The course to be pursued in such a case is provided in Code Section 2964 *et seq.*

Under the pleadings and evidence, we think the doctrine of acquiescence does not apply.

We reach the conclusion that the trial court rightly decided the case, and its decree is, therefore,—*Affirmed.*

WEAVER, C. J., EVANS and SALINGER, JJ., concur.

CARRIE CARLISLE, Administratrix, Appellee, v. DAVENPORT & MUSCATINE RAILWAY COMPANY, Appellant.

RAILROADS: Injury to Passenger—Negligence. Evidence reviewed, and held to present a jury question on the issue of contributory negligence in a case where deceased, in the nighttime, at a railway station, and in a place of danger, but in compliance with the rules of the company, was signaling a train to stop.

Appeal from Muscatine District Court.—M. F. DONEGAN, Judge.

MARCH 15, 1920.

ACTION to recover damages for the death of plaintiff's intestate. Trial to a jury. The trial court overruled defendant's motion for a directed verdict, made at the close of plaintiff's testimony, and again at the close of all the testimony. The jury returned a verdict for plaintiff for \$1,000. Defendant's motion for new trial was overruled, and judgment entered on the verdict. Defendant appeals.—*Affirmed.*

E. M. Warner, for appellant.

Kaufmann & Willis, J. J. Fishburn, and G. Albee, for appellee.

PRESTON, J.—Several grounds of negligence were alleged in the petition, but those submitted were:

"That, on the 8th day of November, 1913, between 9 and 10 o'clock P. M., the plaintiff's intestate, Albert Dollarhide, was at a station upon said line of railway, called Mel-pine Station, for the purpose of becoming a passenger upon one of the cars of said company; and, while upon the platform of said station, he was struck by the defendant's car, and received injuries which caused his death; that the plaintiff's intestate was free from contributory negligence; and

that the defendant was negligent, in that the car which struck the plaintiff's intestate was, at the time, being operated at a reckless rate of speed, to wit, at a rate of 40 to 50 miles per hour; and that the defendant was negligent in that, by the signals given by the motorman upon said car, the deceased was led to believe that said car was going to stop at said station; and that said car approached at said high and dangerous rate of speed, and deceased was struck by the front part of said car and killed."

Appellant states in argument that they desire to submit the case on two propositions only. It is contended that the evidence does not show that defendant was guilty of any negligence, and that the record conclusively shows that plaintiff's intestate was guilty of contributory negligence. It is also thought that the verdict is contrary to Instruction No. 12, and that, under the evidence and the instruction, the verdict should have been for the defendant. Instruction No. 12 reads thus:

"You are instructed that it was the duty of Albert Dollarhide, after his signal to the motorman, if he gave one, was answered, to step back from the track to a place of safety, if, under the circumstances, he could reasonably have done so. Due care for his own safety required this of him. If you find from the evidence that his signal to the motorman was answered, and the answer was heard by him when the car was a sufficient distance from him to have enabled him to retreat to a place of safety, and that he negligently failed to do so, then you should find that he was guilty of contributory negligence, and your verdict should be for the defendant."

No complaint is made as to the form of the instruction. A discussion of the evidence and the holding that the evidence was such as to make it a jury question in regard to the alleged contributory negligence, will dispose of the objection in regard to the instruction. Appellant's theory

of the case appears to be somewhat different on this appeal from what it was on the first hearing. Appellant's argument is directed almost entirely to the question of plaintiff's contributory negligence, while appellee argues more the question of defendant's negligence. On the former appeal, 178 Iowa 224, it was determined that the evidence was sufficient to take the case to the jury on defendant's alleged negligence. The evidence in that regard is substantially the same on this appeal. Aside from that, we are satisfied, from an examination of the evidence on this appeal, that the question of defendant's negligence was properly submitted to the jury, so that we deem it unnecessary to review the evidence on that point. There was some discussion in regard to the question of contributory negligence on the former appeal, but it is not presented now in just the same manner as it was before. On the former appeal, the court directed a verdict for the defendant, at the close of the plaintiff's evidence, and the case was determined without the evidence for the defendant. The evidence is set out, to some extent, on the former appeal, but we deem it necessary, in view of the argument now presented, to set out some additional facts bearing on the question of contributory negligence, which we shall attempt to do without repetition.

Melpine Station is 11 or 12 miles from Muscatine. The track at that point runs generally east and west, though not exactly so. A public highway crosses the railway at this point, at right angles. The only building is the booth for the protection of passengers which stands on the north side of the railway track, and immediately adjacent to the east side of the highway. The booth was $8\frac{1}{2}$ feet from the track, $5\frac{1}{2}$ feet deep, and $9\frac{1}{2}$ feet in length. The side next the track was open. The floor of the booth was continued to the north rail. There were no planks between the rails in front of the booth, but, on the opposite side of the track,

there was a platform for the use of passengers. There is a wing cattle guard fence along the east end of the platform. The station is at the west end of a curve, which begins about 450 feet to the east. There is something of a cut through which the railway passes, at a point about 1,200 feet east of the station. There is a 1 per cent grade from the east to the west. Appellant contends that a car approaching the station is at all times in full view of a person standing upon the platform, for a distance of about half a mile east, but appellees contend that there is more or less obstruction to the view. Some of the witnesses testify that it was a cold, dark, cloudy night, and that there was a heavy wind blowing from the northwest. Others say that it was not very dark. The headlight was shining brightly, and the evidence shows that it would temporarily blind a person at the booth, after the car had straightened around the curve, but before that, the middle of the ray of light would strike 78 feet south of the station, when the car is 600 feet distant, 19 feet, when it was 300 feet, nearly 9 feet, at a distance of 200 feet, 2 feet, at a distance of 100 feet, and 6 inches at a distance of 50 feet, so that it would be flashed on a person at the station suddenly. A witness testifies that, when the light is thrown upon the platform at the station, it is thrown gradually, as the car rounds the curve. The outer rays at first come upon the platform, and then the stronger rays from the center of the reflection. However, the lights in the car would show from the side, at certain places. Passengers on the car and others, one of such others being a party in an automobile, who was racing with the interurban car, gave testimony as to the lights, whistles, speed of the interurban, etc. There is some conflict in the testimony at some points on these matters; but it seems to be undisputed that the motorman gave the station whistle signal at the whistling post, about 1,500 feet east of the station, and the evidence tends to show that thereafter, when

approaching the station at a distance variously estimated at from 200 to 400 feet, the whistle was sounded. As a summary of the testimony of one witness, he says:

"Q. About 1,500 feet east of the station, at the regular whistling place, you heard one long blast of the whistle; then, within 200 or 300 feet of the station, you heard two; then, when the car was passing the station, or after it had passed the station, you heard three short blasts; and then, before the motorman backed the car back to the station, you heard three more short blasts? A. Yes."

The car stopped at Melpine for passengers only on signal. There is evidence from which the jury could have found that deceased gave the night signal, or was in the act of giving it, when he was struck. He was familiar with the surroundings, and the method of giving the signal, and left his home near by, with matches. When he left home, he was in full possession of his faculties; was not ill or excited; went as he normally would have gone. After the accident, some burned paper was found, close to the track. Appellant concedes in argument that the jury might be warranted in finding that, when the car was from 200 to 300 feet from the station, the motorman saw decedent's signal, and answered it. This, we think, has an important bearing on the question of the alleged contributory negligence of deceased, considering the appearances from his viewpoint, even though the motorman did not, as he says, receive the signal. He having given the signal, and the motorman having answered it, deceased had a right to assume that the car would stop at the station; and the jury may well have found that deceased did not have time to step back from the track to a place of safety, after he discovered, if he did, that the car was not going to stop. The car was going very fast, and appellant concedes and figures that the car would go the distance from the time the motorman answered the signal, to the station, in three seconds, and argues that this was

time enough for deceased to step back to a place of safety. This might be so, under some circumstances, but appellee argues that deceased was temporarily blinded by the headlight, and became confused; that the car was coming at a high and excessive rate of speed; that he had a right to suppose the car would stop; and that, if he was in a place of danger, on or close to the track, he had been invited there, to give the stop signal, by the rules of the defendant company; which will be referred to in a moment. There are other circumstances bearing upon this point, some of which, in regard to the position of deceased and the character of his injuries, will be mentioned later. The tendency of the bright headlight to blind him, and the obstructions, and so on, have already been mentioned. The motorman testified that he received no signal to stop, and that he did not intend to stop. The testimony of the various witnesses is to the effect that the car was going at the rate of from 40 to 55 miles an hour. There is some contradiction in the testimony of the motorman as to this. At one point in his testimony, he says that, after he gave the whistle at the whistling post, he slowed down to about 30 to 35 miles an hour. At another place, he says substantially that, when he saw there was no signal, and no passengers, he did not intend to stop; and that he increased his speed, after passing the whistling post, and gave a through whistle, and also whistled when he was about at the booth. He also makes some claim in his testimony to have whistled for the crossing, but he contradicts himself, to some extent, as to that. The motorman says that, at about the time he reached the booth, the deceased came out of the booth and upon the track, when the car was practically upon him; but he is contradicted by the circumstances, and the jury may well have found that the motorman was mistaken in this. Plaintiff contends that deceased was in the act of giving the signal at the time he was struck, and, under the circumstances, and

as stated, had not time to step back. The testimony shows that the burned piece of paper was close to the track on the north side, and that there were blood splotches towards the west, from 1 to 3 feet from the north rail. The injuries of the deceased were such as to indicate that deceased was in that position. The ribs on his right side were broken, and the bones of the entire right forearm about the wrist were crushed. The broken pieces of bone protruded through the flesh, indicating that it was struck by the car, and the testimony is that the injury could have been so inflicted. Witnesses give their opinion that, from appearances, the arm was not run over. There were some other injuries. In signaling a car coming from the east, deceased would naturally be facing east; whereas, had he come from the north, and was going south, as claimed by the motorman, he would have been more likely to have been injured on the left side.

The rules of the company, posted in the station at Mel-pine, provide:

"When you hear approaching train sounding one long blast of whistle for station, step out to the rail, and extend one arm horizontally across the track. Remain so until the motorman answers with two short blasts of whistle, then step back away from the rail. At night, do the same, holding a lighted match or burning paper in your hand, waving same, until the motorman replies with two short blasts of the whistle."

Deceased went to the station for the purpose of taking this car, and had taken the initial steps to becoming a passenger.

Appellant cites and relies on *Artz v. Chicago, R. I. & P. R. Co.*, 34 Iowa 153; *Landis v. Inter-Urban R. Co.*, 166 Iowa 20, 21; *Hinken v. Iowa Cent. R. Co.*, 97 Iowa 603; *Wilson v. Illinois Cent. R. Co.*, 150 Iowa 33; and like cases. Without reviewing the facts in such cases, we think that, because of the difference between the facts therein and in

the instant case, they are not in point. Appellee cites *Lundien v. Fort Dodge, D. M. & S. R. Co.*, 166 Iowa 85, 90, and *Kern v. Des Moines City R. Co.*, 141 Iowa 620, 631, to the point that defendant could not place plaintiff in danger by its own negligence, and then excuse itself on the ground that the injured party did not exercise care in extricating himself from the peril thus induced. They also cite the *Lundien* case, *supra*, to the proposition that deceased, to follow the defendant's instructions to stop the car, was compelled by the defendant to put himself in a place of danger, and his conduct can only be judged by considering what he had a right to expect from the other party.

In *Karr v. Milwaukee L., H. & T. Co.*, 132 Wis. 662 (113 N. W. 62), the facts were somewhat analogous to those in the instant case, and it was held that the question of the alleged contributory negligence was for the jury. The question is discussed in that case whether the party was a passenger or not; but that question seems not to be raised in this case. No case precisely in point as to the facts is cited. That, of course, would be difficult to do. Each case must stand upon its own bottom. We are of opinion that the circumstances heretofore set out were sufficient to take the case to the jury, and that the jury was justified, under Instruction No. 12, and under the entire record, in finding that deceased was not guilty of contributory negligence. The judgment is—*Affirmed*.

WEAVER, C. J., EVANS and SALINGER, JJ., concur.

MARSH DELASHMUTT, Appellant, v. JESSE MCCOY et al.,
Appellees.

PARENT AND CHILD: Right to Custody of Child. Evidence re-
1 viewed, and held to show that the interests of the child in ques-

tion would best be conserved by remaining with its grandparents.

HABEAS CORPUS: Findings Equal to Jury Finding. Findings of 2 the trial court in habeas corpus have the standing of findings by a jury.

Appeal from Woodbury District Court.—W. G. SEARS,
Judge.

MARCH 15, 1920.

THE opinion sufficiently states the case.—*Affirmed.*

Prichard & Prichard, for appellant.

Jepson & Struble, for appellees.

WEAVER, C. J.—This is a habeas corpus proceeding, begun in the district court of Woodbury County, to determine the right to the custody of a minor child, Helen May Delashmutt. The mother of the child is dead,
1. **PARENT AND CHILD:** Right to custody of child. the plaintiff is her father, and the defendants are her maternal grandparents. The trial court, having heard the evidence offered by the parties, found for the defendants, and remanded the child to their keeping. Plaintiff appeals.

We shall not attempt any protracted statement of the facts. The proceedings are legal in character, and, in so far as the finding or judgment of the trial court involves any consideration of disputed matters of fact,
2. **HABEAS CORPUS:** findings equal to jury finding. it comes to us sustained by the same presumption of correctness which attaches to the verdict of a jury in ordinary actions generally. The evidence was such as would justify the court in finding, and we may presume it did find, that plaintiff and wife were married in July, 1914; that the families on both sides are farmers, in comfortable circumstances, but that the young couple had little means of their own, except in

their capacity to do the labor usual in farming communities; that the plaintiff is deficient in steadiness and industry; and that, during the period between his marriage, in July, 1914, and his entrance into the army, in July, 1918, his work and employment were of a fitful and irregular character. The wife, too, went out to service. There were times, also, when they found a temporary home with their parents and other relatives on either side. Whether because of absence of real family and home life, or for other reasons into which we need not inquire, there developed a lack of harmony between the parties, which the birth of the child did not serve to cure. On at least two occasions, they separated, and, for a year before plaintiff went into the army, they had not lived together. During that time, the wife worked for her brother, and the child was kept and maintained by her parents, the defendants herein.

At one time, she instituted proceedings for divorce, on the ground of cruel and inhuman treatment, but the case was never brought to trial. After about six months' military service, plaintiff returned to the neighborhood of his former home. Very soon thereafter, the wife became sick, and was taken from her brother's home to the hospital, where she died. A few hours before her death, plaintiff visited her at the hospital, and, as she had embraced the Catholic faith, they went through the form of a religious marriage service, at her request. The expenses of her last sickness and burial were paid by her parents or other members of her family.

In the event, that he is awarded the custody of the child, the appellant, who has no property of his own, expresses the purpose to give it into the care of his father and mother, until he shall have made or obtained a home for himself. The parents express their willingness to receive and care for and educate the child, and to "adopt her, if necessary." The defendants, having had her in their care for a long time, are naturally attached to her, and desire to retain her

custody. They are apparently both willing and reasonably able to give her a comfortable home and proper nurture. Indeed, the practical question presented seems to turn less upon the legal right of the plaintiff to the charge of the child than upon the question between the paternal and maternal grandparents, as to which shall furnish the motherless child a home.

Without any disparagement of the ability or good faith of the plaintiff's parents, we think the finding of the trial court that the defendants have the better right in the premises, and that the interests of the child will be best conserved by leaving her in the charge of those who have had her principal care during most of her life, has ample support in the evidence, and the order and judgment appealed from should be—*Affirmed*.

EVANS, PRESTON, and SALINGER, JJ., concur.

T. W. DWYER, Appellee, v. ALFRED CHRISTIANSON et al., Appellants.

ADVERSE POSSESSION: Possession Under Unfounded Claim. Possession of land under a good-faith claim as a riparian owner, though such claim was originally not legally maintainable, may ripen into absolute title by adverse possession, if continued for 10 years. So held where plaintiff purchased land held under such a claim, and held possession thereunder for some 20 years.

Appeal from Hamilton District Court.—H. E. FRY, Judge.

MARCH 15, 1920.

ACTION in equity to restrain defendants from building a fence and obstructing the free use by plaintiff of his land. A temporary injunction was issued. On the final hearing, the court decided that plaintiff has a good title by adverse

possession to the land in dispute, dismissed defendant's cross-petition, claiming title, and made the temporary injunction permanent against the defendants. The defendants appeal.—*Affirmed.*

Price & Burnquist and *Burnstedt & Hemingway*, for appellants.

D. C. Chase, for appellee.

PRESTON, J.—This case grows out of a similar state of facts found in *Bryan v. Christianson*, 188 Iowa 669. A plat will be there found, showing the general situation. The land in question in the instant case is Lot 2, and is north of Iowa Lake.

The plaintiff claims to be the owner in fee simple of the west half of the northeast quarter of Section 15, and that he has been in the absolute, peaceful, adverse, and undisturbed possession of the same and every parcel thereof for more than 18 years last past, continuously, under claim of right and color of title; that, during his possession, he has constructed fences and made valuable improvements on said land; that defendants have threatened and are about to enter upon the said premises and cut down the fences surrounding said land, and they are attempting to erect another fence upon the land, cutting from 17 to 18 acres off the south side of said land; that said fence will be placed on plaintiff's land, if erected, and over his growing crops, and cause him irreparable injury, and plaintiff will be deprived of the free use and possession of his land.

The defendants denied plaintiff's claim as to the south 17.42 acres. Defendants claim to be the absolute owners of the 17.42 acres, by virtue of a chain of title beginning with the patent from the United States to the state of Iowa, issued on December 7, 1904, and filed for record in Hamilton County, February 8, 1905, and from the state of Iowa

to Hamilton County, dated December 23, 1904, and filed for record, January 5, 1905, in Hamilton County, and from Hamilton County, through several grantors, to the defendants. They say that plaintiff's record title shows him to be the owner of all except the 17.42 acres, his deed from the original owner conveying only Government Lot 2, which consists of the north part of the south half of the west half of the northeast quarter.

The land in controversy was a part of what was formerly known as Iowa Lake, a body of meandered lake bed. There had been but very little water in it for more than 30 years. No patent was issued to this land by the government until 1904. At an early day, the surrounding landowners, including plaintiff's grantor, under claims of rights therein, had squared out their lands, so as to make them correspond with the congressional subdivisions. There had been a government survey of the lake bed, and, after the meandering line had been shown by the survey and plat filed, the land had been laid out in government lots, including Lot 2. They fenced, tiled, cultivated, and improved said lands. One Hurd, plaintiff's grantor, had made such a claim to the land in controversy. He had fenced and occupied it, and later leased it, with his other land. On March 1, 1899, he conveyed Lot 2 to plaintiff, 62.58 acres. The remaining 17.42 acres, the land in question, was then being used and had, for some years prior thereto, been used by said Hurd, in connection with the 62 acres. He did not include the 17 acres in the deed to plaintiff, but he was then using it, and had leased it to others, as he had been for many years in the past, under the claim of riparian ownership. At that time, it was fenced, the same as it had been for a good many years before. There is some conflict in the testimony at this point. Hurd was a witness for the defendants. He had had some trouble with plaintiff, and appears to have been hostile to him. He attempts to contra-

dict plaintiff's testimony as to some of these matters, but, under cross-examination, he substantially admits, though apparently with some reluctance, the plaintiff's claim. Another party was with plaintiff, at the time of the negotiations with Hurd for the purchase by plaintiff of the land. It is fairly established that plaintiff was led to believe, and did believe, that, when he received his deed from Hurd, he would have a right to move upon and claim and hold the land in controversy. As we understand his claim, he contends that he succeeds to Hurd's original claim, and, as well, that he had and claimed an interest or right in the land, by having paid Hurd therefor. Plaintiff paid \$2,800, and claims that he was paying for the 80 acres at \$35 an acre. Hurd testifies that plaintiff came to him with the proposition to give \$2,800, but says, "I don't know how he worded it." Hurd continued to occupy and use the land, the entire 80 acres, after the county obtained the legal title, about 1904, the same as before, and continued to do so for 18 or 20 years after the trial of the case of *Carr v. Moore*, 119 Iowa 152. He was not a party to that action. Plaintiff claims and testifies that he paid Hurd \$35 an acre for the 17 and a fraction acres in controversy, and that he relied on Hurd's statement that he could hold the entire tract, and that the \$2,800 was given in part for the claim and right of Hurd to the land in dispute. Under this claim of right, plaintiff went into possession, March 1, 1899, and ever since has been in the open, notorious, and adverse possession of the land in dispute. He has farmed and improved it, without objection by anyone, and without interference, until defendants sought to move the fence, soon before this suit was brought.

There may be some other circumstances, but this presents the situation in a general way. Even though it be conceded that the claim of Hurd and plaintiff to hold the land in controversy, under some supposed riparian right,

was not a valid legal claim, that would stand the test of litigation, still he and his grantor were making the claim, and, so far as appears, in good faith. They used and occupied it adversely for 30 or 40 years. Under our holding in *Goulding v. Shonquist*, 159 Iowa 647, 649, and other cases, we think plaintiff was making the claim as a claim of right, and that there was a sufficient basis upon which to base his claim of adverse possession, after occupancy thereunder for the requisite length of time. His claim was more than that of a mere trespasser. Some of the cases hold that the claim of a parol gift of land is a sufficient claim of right; others, a canceled homestead entry; and so on. Without a review of the cases, see, as bearing on this proposition, the following: *Wilbur v. Cedar Rapids & M. R. Co.*, 116 Iowa 65; *Hanson v. Gallagher*, 154 Iowa 192, 196; *Ratigan v. Ratigan*, 181 Iowa 861.

We are of opinion that the trial court rightly decided the case, and that plaintiff's claim of right has, by adverse possession, ripened into a title which is good, as against the record title of the defendants.—*Affirmed*.

WEAVER, C. J., EVANS and SALINGER, JJ., concur.

BELLE GERATY et al., Appellees, v. ANNABEL BARBER, Appellant.

HOMESTEAD: In Lieu of Distributive Share—Election. Evidence of acts, conduct, and declarations attending long-continued possession of a homestead, following the death of the owner, reviewed, and held to establish an election to take homestead occupancy, in lieu of distributive share.

Appeal from Howard District Court.—C. N. HOUCK, Judge.

MARCH 15, 1920.

ACTION in equity, to determine the title and right of possession of two lots, together less than half an acre, in the city of Cresco. The defendant, who is the widow of plaintiff's father, claims a one-third interest in the property, under the will of her deceased husband, who, she claims, had not elected to take a homestead interest in the property, but that he was entitled to his distributive share, of one third. Plaintiff's claim is that her father, defendant's deceased husband, had elected to take his homestead right in the property, the title to which was in her mother, who had deceased prior to her father's death, and that plaintiff, as the sole heir, is the owner of the property. The trial court decreed that plaintiff was the absolute owner of the premises, quieted the title in her, as prayed, and issued a writ of possession. The defendant's cross-petition, in which she asked a partition of the property, was dismissed. The defendant appeals.—*Affirmed.*

E. W. Cutting, for appellant.

McCook & Lyons and *W. L. Barker*, for appellees.

PRESTON, J.—There is little, if any, controversy as to the law of the case, although each side cites authorities where, under the facts of the cases cited, it was held either that there had or had not been an election. We have a case which is largely a question of fact, whether J. B. Barber, the surviving husband, took his distributive share, or whether he had elected to occupy the premises under his homestead right. It is conceded that the right to a distributive share is the primary right of a surviving spouse, and that the burden is upon plaintiff to show an election to take homestead for life, in lieu of such share.

Plaintiff alleged that the property was owned by Rose Barber, who died intestate, August 16, 1913, leaving a husband, J. B. Barber, surviving, and the plaintiff, as her only

heir; that, after the death of his wife, J. B. Barber continued to occupy the real estate as his homestead until the date of his death, June 20, 1917, and elected to and did occupy it as his homestead, in lieu of his distributive share. Defendant admits the foregoing allegations, except as to the allegation as to election to occupy as a homestead, which she denies; and says that, on November 4, 1915, J. B. Barber married this defendant, and that he died testate, and that he willed all of his property to defendant.

Rose Barber acquired the property in 1888. The title to the entire property was in her. She and her husband resided on the premises 30 years or more, and did not reside elsewhere or occupy any other home during that time. She died in this property. After her death, J. B. Barber continued to occupy some portion of the larger dwelling, and collected rent for the entire premises, until his death, and died therein. After the death of his wife, he occupied no other premises. After J. B. Barber married the defendant, they together occupied a part of the dwelling, and continued to collect rent for all the premises that he did not occupy, until he died. When Rose Barber acquired the property, there was but one house on it, a single house; but she and her husband occupied it as their homestead. Later, that house was changed into a double house, and since the change, one half has been rented to people, for the purpose of having an income from it. There is also a small house on the lots, which was moved from the farm, and rented for the purpose of income. There is a barn, situated partly on each lot, and a shed, on the back part of the property, which were used by J. B. Barber for his horse, tools, kindling, etc. A witness testifies that the west side of the larger house comes right to the edge of the next lot, and that the east side is built almost to the lot line.

"A good many of the outbuildings is either on one side or the other of the center, and there are apple trees planted

each way; in fact, it is all one property. In the larger house, there is a room below and above on the front of the house that is narrower than the whole width of the house. This room opens into both places. There is a single stairway, leading down into the cellar and up into the second story."

The east part of the larger house is arranged for one family, and the west part for another family. There was a stairway leading to the attic, which went through one of the sleeping rooms of one of the tenants. The tenant had half the attic, and J. B. Barber went to the attic as he liked. At the time Rose Barber died, she and her husband were, and had been, living in the east side of the larger house, and the tenant in the west side. About two months after she died, another tenant moved into the east part of the house, and lived there two and a half years, and then lived on the west side one year. During a part of this time, J. B. reserved one room to live in, and also a room upstairs, to store his things in; and, while occupying the one room reserved, he used the tenant's kitchen, to get hard water, and the cistern, to get soft water. While this tenant occupied the west side, J. B. Barber and the defendant occupied the east side of the house. While J. B. was thus occupying the premises, he repeatedly stated to different ones that it was his home, and that he intended to live there as long as he lived. To one, he said repeatedly that he wanted to keep his home. To another tenant and his wife, he said "that it had always been his home since he bought the place, and always wanted to make it his home as long as he lived; he wanted to make it his home, and use a part of it, at least. He said he would always make it his home." To another witness, he stated, "This is my home, just as long as I live." To another: "That it was his home, and he was not going to break it up. He calculated to make that his home until his death. He wanted to live there until he died." To

another: "‘I will never leave that home while I live;’ that he intended to die on the premises, and he did so die there; Mr. Barber told me when he was through with it, of course that place belonged to Belle Geraty." To the lawyer who drew his will, Mr. Barber said, in substance: "‘I have not much property to will; I have the shop and the house up the street, and my homestead here.’ He didn’t explain that he had a share, or that he had an absolute estate, or an estate by possession. No explanation of any specific nature was made." Mr. Barber proposed to the lawyer, in drawing the will, that the property in question should be described therein; but this was not done, because the description was not then at hand. There is evidence that Mr. Barber knew that plaintiff was claiming that he had only a life use of the property; that he told a witness in Minneapolis that his daughter was questioning his right to any more than a life use, and that she was resisting his claim to an undivided one third. He had the right to bring a partition suit, notwithstanding plaintiff’s resistance to his claim. This he did not do, but continued to occupy the premises. We have attempted not to go into detail, and there may be some other circumstances; but, under the record, and from the circumstances detailed, which are substantially undisputed, appellees contend that, notwithstanding defendant’s evidence as to contrary declarations by J. B. Barber, it was his intention to elect, and that he did elect, to occupy the premises as a homestead, in lieu of his distributive share.

On the other hand, there is evidence that Mr. Barber claimed to other witnesses that he owned a one-third interest; to others, he appears to have claimed to own the entire property. As said, he collected the rents for the entire property, after his wife died. In 1915, and again in February, 1917, Mr. Barber listed the property in question with the assessor as his property, and made affidavit thereto, and taxable as such, and that it was assessed to

him. He appears to have been making different claims: first claiming that all the property was his own, and at other times, claiming a one-third interest, and repeatedly stating that he intended to make it his home as long as he lived; and he did, in fact, occupy it for the entire time from the death of his wife until his own death. Under repeated holdings of this court, he could not take both homestead and distributive share in his wife's estate. It is argued by appellant that, because Mr. Barber received all the rent, that fact shows that he was claiming a one-third interest as his distributive share. It is, of course, a circumstance tending to show that he made some claim to the property, but it did not constitute a specific claim to one third. His receiving rent for all of it, while occupying a part of it, is not, we think, inconsistent with a claim of homestead. His receiving rent for all would not divest the homestead right. We shall not go into the details as to defendant's evidence. The substance of it has already been referred to. There are circumstances in connection with the evidence of the defendant and some of her witnesses which affect somewhat their credibility. On the whole record, we are satisfied that the greater weight of the evidence is with the plaintiff, and that she has sustained the burden, and shown that J. B. Barber did elect to take his homestead right, and that all his acts and conduct, with the declarations and other circumstances, are inconsistent with the claim of any other estate in the property.

It is contended by plaintiff that the construction of the double house on the west part of the lot was such that it could not be divided, as neither side contained a complete dwelling property, but each was dependent upon the whole, there being but one stairway up and down, and a distributive share in this property could not be set off, so as to constitute a residence property not depending upon the remain-

der. On this they cite *Buckles v. Matson*, 178 Iowa 310; *Edmonds v. Davis*, 122 Iowa 561, 562; *Cass County Bank v. Weber*, 83 Iowa 63; *Groneweg v. Beck*, 93 Iowa 717. Furthermore, Mr. Barber had the right to occupy all of it, though he did not do so at any one time. But the evidence shows that he did so at different times, by occupying one part at one time and other parts at other times.

Appellant relies largely on *Bosworth v. Blaine*, 170 Iowa 296; but we think it may be readily distinguished, when we consider the different state of facts. In that case, the surviving spouse was seeking to claim a homestead right, in order to avoid a judgment, wherein it was sought to hold his distributive share; and, against his claim and testimony that he was claiming a homestead, it was held that he had not made such an election. It was shown that he had never unequivocally asserted a homestead right in the land, but, on the other hand, he had an arrangement with his children by which he received the rent, which was applied, in part, for his support, and the balance on a mortgage on the land; that he had mortgaged his undivided one third of the land; that he had repeatedly made efforts to sell the land. The instant case may also be distinguished from the case of *Joslin v. Beam*, 187 Iowa 1090. In that case, the possession of the survivor was referable to a prior deed, giving the right of possession. It is true, as contended, that continued occupancy of the premises as a homestead is not conclusive of an election to take the homestead. *Gray v. Wright*, 142 Iowa 225, 227; *Joslin v. Beam*, supra. We said, in the *Gray* case, that, ordinarily, an election to take the homestead right is evidenced by the continued occupancy of the premises as a homestead. In the instant case, there are circumstances, in addition to the occupancy, which, as we have said, show an election. We think the finding and de-

cree of the trial court were right, and in accord with the evidence and law. It is, therefore,—*Affirmed*.

WEAVER, C. J., EVANS and SALINGER, JJ., concur.

MARIE HICKMAN, Appellee, v. M. G. HICKMAN, Appellant.

DIVORCE: Cruelty—Coarseness of Language and Conduct. Profane

1 and abusive language towards a frail woman, untrue and repulsive accusations concerning her conduct, neglect of her common comfort, with consequent injury to her health, may constitute cruel and inhuman conduct.

DIVORCE: Condonation. Condonation of cruelty is necessarily at-

2 tended with the condition that the cruelty shall cease; and especially is this true when the wife is the condoning party.

Appeal from Hardin District Court.—G. D. THOMPSON, Judge.

MARCH 15, 1920.

SUIT for divorce on the ground of cruel and inhuman treatment. There was a decree for the plaintiff. The defendant appeals.—*Affirmed*.

Peisen & Soper, for appellant.

W. R. Williams, for appellee.

EVANS, J.—The parties were married on January 22, 1914. The plaintiff was 18 years of age, and defendant 22. This suit was begun in August, 1917. Three children were born to the marriage. The plaintiff charged

1. **DIVORCE:**
cruelty:
coarseness of
language and
conduct.

cruel treatment, endangering her life. The cruel treatment charged did not include personal violence. It did include harsh and profane language and threats, and much conduct indicating great disregard of the plaintiff's feelings. The plaintiff is

a frail person, whereas the defendant appears to be a strong, vigorous man. With three babes coming into her arms in as many years, it is not difficult to believe that the plaintiff has seen weariness and suffering, and has needed the solace of a husband's affection. If she did, in fact, have such affection, it was not demonstrative. The testimony in her behalf tends to show that he frequently called her a "son-of-a-bitch;" that the same epithet, with additional embellishments, was applied to her parents; that he threatened to leave her; that he invited her to leave him; that he told her he was done with her; that he neglected her at childbirth, especially on the last two occasions; that he repeatedly and consistently denied the paternity of each of his children; that, in some instances, this was done before the child was born.

The defendant affected great hostility to plaintiff's parents, and forbade their visiting the home, though they were, at times, much needed there. On one occasion, he assaulted plaintiff's stepfather, without apparent cause. As a witness, he testified as to his reason for his hostility to the stepfather to the effect that his wife had informed him of improper conduct of the stepfather toward the plaintiff before she was married, and also at a time shortly prior to the birth of her second child. The plaintiff denied that she ever gave such information to the defendant, and testified that there was no truth in such a charge. We think her denial in this regard should be taken as true.

The defendant denied all of the testimony on behalf of the plaintiff tending to show the cruel conduct. He also testified that their marriage relations had, as he supposed, been pleasant, and marred only by the hostility of plaintiff's parents. It is quite clear from the record, however, that, in the year 1916, he was secretly consulting an attorney, with reference to his marriage relations; also, that he was carrying on an affectionate correspondence with a former

sweetheart. He has undoubtedly given a false reason for his admitted hostility to the plaintiff's parents.

That the defendant's conduct has operated heavily upon the health of the plaintiff, and that she has endured great mental suffering and considerable bodily illness as a result of it, fairly appears.

The defendant pleads condonation. This plea is predicated upon the alleged fact that the parties cohabited, after the alleged cruelty. But cohabitation is not necessarily a

2. Divorce:
condonation.

condonation of cruel treatment, and this is especially so as to the wife. As the weaker vessel, and as the victim of such cruel treatment, she is often to be deemed as under some degree of duress. Her moral freedom of action is to be considered, on a plea of her condonation. Condonation, if proved, implies the condition that kindness shall supplant the cruelty complained of. Subsequent conjugal unkindness will avoid condonation, even though such unkindness be less than extreme cruelty, and be insufficient, of itself, as a ground of divorce. *Harrison v. Harrison*, 20 Ala. 629 (56 Am. Dec. 227); *Robbins v. Robbins*, 100 Mass. 150 (97 Am. Dec. 91); *Langdon v. Langdon*, 25 Vt. 678 (60 Am. Dec. 296).

Moreover, cruelty does not, of itself, become a ground of action. It must be endured by the aggrieved party to the breaking point, even though it continue for a long period of time. If the aggrieved party can endure it without danger to life, she has no cause of action for divorce. Up to that point, she can do nothing but condone. It is only when the cruelty becomes a danger to life that a cause of action accrues therefor.

Upon a careful examination of the entire record, we reach the conclusion that the trial court properly awarded

the decree to the plaintiff. The decree is, accordingly,—*Affirmed.*

WEAVER, C. J., PRESTON and SALINGER, J.J., concur.

IN RE ESTATE OF MATT FOUSEK.

FRANK FOUSEK et al., Appellees, v. MARY PLOWER et al.,
Appellants.

WILLS: Mental Competency—Inequitableness. Apparent inequity in a will may wholly disappear when due consideration is given to the history of the family: (1) The relative amount which each child has contributed in labor or otherwise to testator's property; (2) the amount of advancements to pretermitted children; (3) and the relative financial condition of each child.

Appeal from Linn District Court.—JOHN T. MOFFIT, Judge.

DECEMBER 16, 1919.

REHEARING DENIED MARCH 15, 1920.

THIS is a will contest. The testator was Matt Fousek. He left surviving him a widow and ten children. The children were seven sons and three daughters. The seven sons are the proponents of the will. Two of the daughters appeared as contestants. The grounds of the contest were undue influence and mental incompetency. At the close of all the evidence, the trial court dismissed the contest, and directed a verdict for the proponents. The contestants appealed.—*Affirmed.*

Voris & Haas, for appellants.

Remley & Remley and *F. L. Anderson*, for appellees.

EVANS, J.—The argument for appellants in this court is directed to the charge that the testator was mentally in-

competent. It is not claimed that there was any evidence of undue influence. The testator was past 91 years of age when he made the will. He lived nearly 3 years thereafter. At the time of making the will, his property consisted of a farm of 160 acres. In addition thereto, he had, at the time of his death, about \$1,100 in money. His entire estate was worth approximately \$20,000. The will gave the widow, then about 70 years of age, the life use of all the property. It contained bequests to the daughters of \$500 each, to be paid after the death of the widow, out of the proceeds of the sale of the farm. The bequests to the sons gave to each of them one seventh of the remainder of the proceeds of the sale of such farm. The money on hand was not disposed of by the will. The testator was a Bohemian by birth. He came to this country at 30 years of age. At 40, he entered the Union army, in the War of the Rebellion. He lived the greater part of his life in the community where he died. He acquired his property by slow process and by great industry. His farm was of poor quality. He was a man of good habits and good character. He had remarkable health. He had never been sick until his last illness, which lasted only a few days. In the last years of his life, his faculties had failed, to a greater or less degree, and this included the faculty of memory. He transacted his own business to the end of his life. It does not appear that he ever made any mistake in business transactions. His business was not extensive, but, such as it was, it needed intelligent attention.

The question presented to us is whether there was sufficient evidence of mental incompetency introduced on behalf of the contestants to require the submission of the case to the jury. To put it in another way, if the submission of the case to a jury had resulted in a verdict adverse to the will, could we have sustained such verdict upon this record?

The general nature of the evidence on behalf of the contestants was to the effect that the testator was feeble, physically and mentally, in that he was forgetful, and frequently failed to recognize people whom he ought to know. The record is presented here in an abstract by the appellants, and in a very extensive denial and amendment of abstract by the appellees. The appellants are at a disadvantage here, because they have built their argument solely upon their own abstract, and largely upon those portions thereof which are eliminated by the amended abstract of the appellees. We have, notwithstanding, gone through the record with a care demanded by the importance of the case. The great age of the testator at the time of making the will is a circumstance not to be ignored, on the one hand, nor, on the other hand, is it to be deemed as casting any burden of proof upon the proponents.

It is contended for appellants that the will was unnatural, in that it was inequitable to the children, toward all of whom the testator had equal affection. If true, this circumstance also has appropriate significance. But the unnaturalness or want of equity of the will is not to be deemed as self-evident on the face thereof, as a matter of mathematics. On this question, the history of the family is to be considered, and the moral equities and obligations appearing therefrom. Speaking broadly, it appears that the sons, and each of them, had contributed more valuable services in the acquisition of the property than had the daughters. Each of the daughters, at the time of her marriage, had received, as a settlement from the father, the sum of \$300, and other personal property of a value of \$100. As compared with his means at the time, these were liberal settlements. These payments had been made to the daughters 19 years, 25 years, and 27 years, respectively, prior to the death of the testator. At the time these settlements were made, the testator's farm consisted of only 80 acres.

All of the sons remained at home after their majority, and worked without compensation for a period of years. Some of them remained as long as 6 or 7 years. In 1901, when the testator was 78 years of age, another 80-acre tract was bought, largely on credit, and was later paid for, but by the aid of the labor of the younger sons. It is true that each son, at the time of his marriage, received aid from the father in the form of property. They received, however, no money, and their claim is that the property received by them was only the equivalent of the property received by the daughters, in addition to the cash payment of \$300.

As bearing on this question, the circumstances of the members of the family are a proper consideration. These are touched upon rather meagerly in the record. For aught that appears, the daughters may have been in prosperous circumstances, and living upon farms owned by their husbands, as claimed by counsel for appellee, and the sons landless. Discrimination in such a case by a parent is not indicative of want of equal affection, nor want of testamentary capacity.

The circumstances attending the making of the will are significant. They disclose a thoughtful attempt on the part of the testator to deal fairly with all his children. It is an interesting fact that a computation of interest at 6 per cent per annum, from the period of time since the oldest daughter received her \$300, plus \$500, puts her on a substantial equality with the shares bequeathed to each son.

We are clear that a jury would not be warranted in finding that the will in question was inequitable or unnatural, within the meaning of the law. The other evidence of mental incompetency is of a very unsatisfactory character, and should be characterized, we think, as mere scintilla.

We reach the conclusion that, upon this record, a jury would not have been warranted in finding a verdict adverse

to the mental competency of the testator. The verdict was, therefore, properly directed, and the order of the court is—*Affirmed*.

LADD, C. J., PRESTON and SALINGER, JJ., concur.

E. C. SCHUSTER, Appellant, v. WILLIAM MILLER et al.,
Appellees.

WATERS AND WATERCOURSES: Uncertain Record. Record reviewed, and held too uncertain to justify the court in reviewing the findings of fact by the trial court.

Appeal from Polk District Court.—JOSEPH E. MEYER,
Judge.

MARCH 15, 1920.

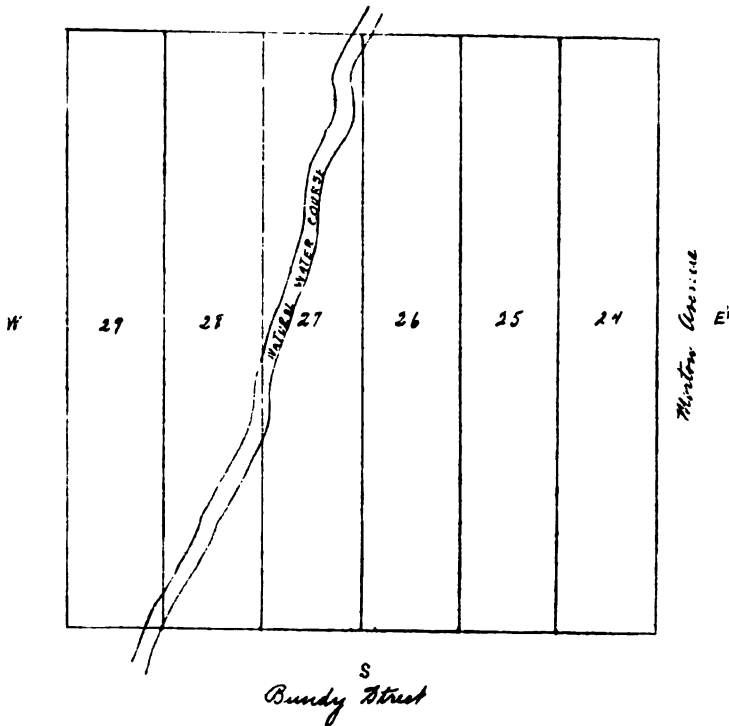
SUIT in equity, to enjoin the defendants from interfering with the flow of surface water in its natural course. After trial upon the merits, the district court dismissed the plaintiff's petition, and he appeals.—*Affirmed*.

J. E. Holmes and *M. E. Van Laningham*, for appellant.

No appearance for appellees.

EVANS, J.—We have no argument for appellees. The plaintiff put in evidence Exhibit A. as follows:

*Plat of part of Block 5, Rodgers Place, being
 Official Plat of E 1/2 of N 1/4 1/4, Sec. 33, Twp. 13 N
 R 24 W 6th PM, Cook Co., Iowa, showing lots
 24, 25, 26, 27, 28 and 29*



The plaintiff is the owner of Lots 24, 25, and 26. The defendant Miller is the owner of Lots 27, 28, 29, and other lots. The defendant's lots lie west of those of the plaintiff. There is a natural watercourse, which enters these lots near the northwest corner of Lot 26, and carries surface water in a southerly and southwesterly direction into a culvert across Bundy Street. The general contention of plaintiff, as appellant, is that the location of such watercourse is as shown upon Exhibit A. We are satisfied, however, that this

is an erroneous claim, either through inadvertence of the plaintiff or otherwise. Plaintiff called one Dickinson, an engineer, as a witness, who testified to the elevations of the surface in the immediate vicinity of the watercourse. It appears that this watercourse is something of a zone, and extends either along or close to the line between Lots 26 and 27, for a considerable distance from the north. Near the south end, it bears further to the west, the lowest point, according to the testimony of plaintiff's engineer, being 32 feet west of the southwest corner of Lot 26. The difference in elevation, for a considerable space, is a matter of inches. Concerning Exhibit A, Dickinson testified as follows:

"Exhibit A does not show the correct position of the natural watercourse. The change would be in the middle of the lot there. Move it south, it run down the middle of Lot 27. My claim is it would strike within a very few feet—I would say 5 anyway—of the northwest corner of Lot 26. In other words, it would strike within 5 feet, one way or the other, of Lot 26, depending on the fill or accretion from wash to the north which has been deposited there. The natural watercourse would follow the west line of Lot 26, about 25 feet to the south. From there, it would shoot in a straight line to a point on the north line of Bundy Street, 32 feet west of the southwest corner of Lot 26."

It is very certain, upon this record, that the center of the watercourse cannot be shifted more than 32 feet west of the southeast corner of Lot 27, or the southwest corner of Lot 26. The contention of plaintiff, as indicated by the exhibit, locates such watercourse as extending across Lots 27 and 28, and cutting the corner of Lot 29. The testimony for the defendants is to the effect that the watercourse comes into Lot 26 at from 10 to 20 feet east of its northwest corner, and extends south along the west line for more than half its length, and that then it bears slightly into Lot 27, and cuts the southeast corner thereof. The record does not

disclose the width of these lots. We cannot state, therefore, how much variance there is between the location claimed by plaintiff on his plat and the location fixed by his engineer. Assuming that the natural course of the water would carry it across the south line of these lots at a point 32 feet west of the southwest corner of Lot 26, there is nothing in the record before us to show that the water does not pass out at such point now. Both of these parties have done more or less filling of their respective lots; but the most that is disclosed by the record is that the defendant has prevented the flow of water along the course indicated upon Exhibit A. In view of the uncertainty of the record in this regard, we would not be justified in attempting a review of the finding of facts by the district court. The burden on the merits was upon the plaintiff in the district court. Not only is the same burden upon him in this court, but the burden of the record is upon him, also. The decree entered below will, therefore, be—*Affirmed*.

WEAVER, C. J., PRESTON and SALINGER, JJ., concur.

STEIL-HAHN COMPANY, Appellant, v. WESTERN UNION TELEGRAPH COMPANY, Appellee.

TELEGRAPHS AND TELEPHONES: Delayed Delivery—Written

- 1 **Notice of Claim.** Written notices of claim for damages because of delayed delivery of messages must show on their face that they make claim *on behalf of plaintiff*. (Sec. 2164, Code, 1897.)

PLEADING: Demurrer—Admission of Legal Conclusion. Demur-

- 2 **rers do not admit averments which put constructions on exhibited writings contrary to what the writings necessarily show on their face.**

Appeal from Palo Alto District Court.—JAMES DE LAND, Judge.

MARCH 15, 1920.

ACTION for damages against the defendant telegraph company for delayed transmission of a telegram. There was a demurrer to the petition, which was sustained, and plaintiff appeals.—*Affirmed.*

E. A. and W. H. Morling, for appellant.

Thomas O'Connor and Jesse A. Miller, for appellee.

EVANS, J.—It appears from the averments of the petition that, sometime prior to March 16, 1918, the plaintiff had consigned a car of corn to Fraser-Smith Company, a commission house, at Milwaukee, Wisconsin. On March 16th, the Fraser-Smith Company wired to the plaintiff an offer of \$1.50 per bushel, in response to which, the plaintiff immediately wired an acceptance.

Each of these telegrams was delayed in transmission about four hours, with the result that the market of that day was lost, and that the corn was sold upon the market of the following day at a loss of 15 cents per bushel.

The demurrer to the petition was based upon the ground that the petition failed to show compliance by the plaintiff with the requirements of Section 2164 of the Code. This section provides:

“But no action for the recovery of such damages shall be maintained unless a claim therefor is presented in writing to such company, officer or agent thereof, within sixty days from time cause of action accrues.”

Under this section, the plaintiff was required, in order to mature a right of action, to present to the defendant company its claim in writing, within 60 days after the accrual

1. **TELEGRAPHS
AND TELE-
PHONES: de-
layed delivery:
written notice
of claim.**

thereof. As bearing upon such question, the petition alleged as follows:

"That, on or about the seventeenth day of April, 1918, the said Fraser-Smith Company, acting for and in behalf of the plaintiff, notified the defendant in writing of the loss and damage sustained by the plaintiff, the original copy of the written notice being in the possession of the defendant, but a copy of the same is as follows, to wit:

" 'April 17, 1918.

" 'Western Union Telegraph Co.,

" 'City.

" 'Gentlemen:

" 'On March 15th at 12:32 P. M. we wired the Steil-Hahn Co. at Mallard, Ia. that we could sell their car of No. 4 white corn which we had on track at \$1.50 per bushel, as per original wire delivered to them herewith attached.'

" 'This bid was good for acceptance until 5 P. M. of the same day, and with any reasonable service, we should have had a reply from them by 2 P. M. You will note, from the attached wire, marked No. 1, that same did not reach Mallard, Iowa, until 4:45 P. M., or 4 hours and 11 minutes. Steil-Hahn Company immediately wired us, at 4:53 P. M., to sell the car of corn, as per their wire, attached, and you will note that this wire did not reach Milwaukee until 8:42 P. M., or another 4 hours delay. As our office was closed, we did not receive this wire until the next morning, the 16th; and, as our bid was only good until 5 P. M., we were obliged to sell this car out the next day, at \$1.35, on a lower market, thereby sustaining a loss of 15 cents per bushel.

" 'We are attaching a letter from the C. A. Krause Milling Company, for your information, substantiating our claim. We are also attaching a copy of the Original Account Sales, as sent the shipper of this car. As this loss is

entirely due to the delay in the transmission of our wire by your company, we are accordingly enclosing our invoice for 15 cents per bushel on the contents of the car, or \$275.68. As we have attached all necessary evidence in the matter, we trust you will let us have your voucher to cover same promptly.

"Yours very truly,
"Fraser Smith Co. Ltd.,
"By _____"

It also averred therein that one of the enclosures referred to in the foregoing written claim was the following statement of the invoice:

"Milwaukee, Wis. April 17, 1918.

"Western Union Telegraph, City, in account with Fraser Smith Co., Grain Commission Merchants,

Duluth Minneapolis Milwaukee

"To loss we sustained acct. delay in message Car 78873
-4w-corn 1837 48 bu. @ 15c per bu. \$275.68"

Unless the case can fairly be differentiated from *Yunker v. Western Union Tel. Co.*, 146 Iowa 499, and *Brockelsby v. Western Union Tel. Co.*, 148 Iowa 273, it is, of course, controlled thereby. The differentiation contended for by the plaintiff, as appellant, is the allegation of his petition, above set forth. This allegation is predicated wholly upon the written claim and statement, copies of which are set forth. The averment that Fraser-Smith Company notified the defendant in writing of the loss and damage "sustained by the plaintiff" is only the pleader's construction of the fair purport of the writings which he sets forth. The real question presented to us, therefore, is, Do these writings purport to present on behalf of this plaintiff a claim for loss or damage sustained by it? The writings thus exhibited are virtually identical

2. PLEADING:
demurrer: admission of
legal conclusion.

with the written claim considered in the *Younker* case. While the pleader may properly aver the agency of Fraser-Smith Company, he cannot, by mere averment, put any other construction upon the writing exhibited than that which it necessarily bears upon its face. In presenting a written claim, under the statute, it was competent for the plaintiff to do so through an agent; but, in such case, the duty thus entrusted to the agent would be precisely the same as that laid upon the plaintiff itself by the statute. Whatever the plaintiff was itself required to do under the statute, such duty remained precisely the same, whether done directly, by itself, or done through an agency.

The difficulty presented by a consideration of the writings is that they do not purport to present any claim of loss or damage "sustained by plaintiff," nor do they purport to be made in his behalf. On the contrary, Fraser-Smith Company puts forth a purported claim in its own behalf for its own damages. Needless to say that damages for delayed transmission of a message may result either to sender or to sendee, or to both. The purpose of the statute is to require prompt notice of a claim for damages while the facts are fresh and traceable. This gives the defendant a fair opportunity to ascertain the facts, and to proceed intelligently with an adjustment of the demand. If it is entitled, under the statute, to a written claim of damage, it would seem to be the very essence of such a claim that it should disclose the extent of the damage and the person who suffered it.

The writing under consideration does not disclose in any manner that the plaintiff was claiming any damage, or that it suffered any.

We see no way to differentiate the written claim before us from those considered in the *Younker* and *Brook-*

elsby cases. The judgment of the lower court must, therefore, be—*Affirmed*.

WEAVER, C. J., PRESTON and SALINGER, JJ., concur.

SUSAN WILLIS, Appellee, v. PETER SCHERTZ, Appellant.

HIGHWAYS: Duty of Guest to Exercise Care. While a mere guest
1 must exercise care commensurate with the circumstances, and
might, in the interest of safety, be under a duty to make suggestions to the driver, or otherwise interfere with the management of the vehicle, yet such guest is not, *per se*, bound to anticipate a violation of law, either on the part of another driver in keeping to the wrong side of the road, or on the part of her own driver in not sounding his horn. (Sec. 1571-m18, Code Supp., 1913.)

TRIAL: Unsuccessful Motion for Directed Verdict—Nonwaiver.
2 The sufficiency of the evidence to sustain the verdict may be raised (a) in requested instructions, or (b) in a motion for a new trial, even though the complaining party unsuccessfully moved for a directed verdict at the close of plaintiff's evidence, and did not repeat the motion at the close of all the evidence.

TRIAL: Argument—Reading Extracts from Testimony. Extracts
3 from the evidence of witnesses may be read to the jury.

NEGLIGENCE: Pleading—Paraphrase by the Court. A paraphrase
4 by the court, in its instructions, of the negligence pleaded, examined, and held to be within the pleadings.

NEGLIGENCE: Contributory Negligence—Unusual Definition. It is
5 not error to define contributory negligence as negligence which "helps" to produce an injury.

TRIAL: Instructions—Exceptions. An exception to an instruction
6 on the ground that "it is not a correct statement of the law" is wholly insufficient. (Sec. 3705-a, Code Supp., 1913.)

DAMAGES: Permanent Injury—Life Tables Not Essential. The
7 introduction of life tables is not essential to the recovery of damages for permanent injury.

DAMAGES: Permanent Injury and Loss of Earning Capacity. An
8 allegation of permanent injury, with claim for damages, is

sufficient basis, if proven, to warrant recovery for depreciation in earning capacity.

DAMAGES: Permanent Injuries and Mental and Physical Pain.

9 Recovery may be had for mental and physical pain, under allegations of severe, permanent injury.

NEW TRIAL: Verdict—Excessiveness—\$1,150. Verdict for \$1,150
10 for personal injury held not excessive.

Appeal from Calhoun District Court.—E. G. ALBERT, Judge.

DECEMBER 16, 1919.

REHEARING DENIED MARCH 15, 1920.

ACTION for damages consequent upon the collision of automobiles resulted in a verdict for plaintiff and judgment thereon. The defendant appeals.—*Affirmed*.

E. C. Stevenson, for appellant.

Gray & Gray, for appellee.

LADD, C. J.—I. At about two o'clock in the afternoon of May 19, 1918, Charles Kleen was driving an automobile in an easterly or northeasterly direction along the highway between the Twin Lakes; and, after passing over the bridge which spans the stream flowing from one lake to the other, observed an automobile, operated by the defendant, approaching from the north, or northeast. Hie Kleen, cousin of Charles, was sitting in the front seat with him; and with the plaintiff on her lap, both being his guests. No one was in the back seat. The evidence was such that the jury might have found that there was a ditch along the side of the road, toward the south lake, and that Kleen drove as near as possible to it; but that the defendant, though driving in an opposite direction, kept on the left side of the highway, and, as there was ample room in the traveled

1. **HIGHWAYS:**
duty of guest
to exercise
care.

way for passage, might, by the exercise of reasonable vigilance, have swung his car to the right side of the traveled way, and have avoided the collision. There was a sign reading, "Slow Down," about 20 feet north or northeast of the bridge. Kleen testified that, upon noticing this, he slowed his car down until it was barely moving, but did not honk his horn; that the traveled way was about 20 feet wide; and that he did not see the defendant's car until it was about 30 feet from him. The defendant testified that he did not observe plaintiff's car until about 30 feet distant; that he had come around a short curve, and saw it in a bend of the road.

Enough of the facts have been recited to indicate that the defendant might have been found to have been negligent in failing to sound a warning of his approach around the curve, and in driving his car on the wrong side of the road, as he approached Kleen's automobile. Kleen's negligence, if such there was, might not be imputed to the plaintiff. Nevertheless, she must have exercised ordinary care, having due regard to her situation as guest of the driver. How far such a guest, in the exercise of ordinary care, is bound to go in suggesting or interfering with the management of the automobile, is often a delicate matter to determine, and necessarily depends on the particular situation. Even though approaching a curve in the traveled way, obscuring the approach of an automobile from the opposite direction, as seems likely to have occurred in this case, much depends on the speed at which the car is moving, and the control of the driver. While the guest may properly be held to the duty of keeping a lookout, she is not bound, as a matter of law, to anticipate that an approaching car from the opposite direction will violate the law of the road by keeping to the left side, nor, when the car is barely moving, that warning necessarily shall be sounded, even though that duty is exacted of the driver. Section 1571-m18, Code Sup-

plement, 1913. Much depends upon the speed at which the car is moving, and the nature of the highway. Where a car is moving slowly, or barely moving, as was said of Kleen's car on the trial, a guest cannot be deemed conclusively negligent in failing to suggest another precaution: that of sounding a warning of its approach. We are of opinion that it was for the jury to say whether the plaintiff was guilty of any want of care in sitting in another's lap, as she was, or in failing to suggest to Kleen that his horn be honked in nearing the curve. The evidence was such as to carry the issues to the jury.

II. Appellee contends that the sufficiency of the evidence to support the verdict was not challenged. At the close of plaintiff's evidence, defendant moved that a verdict

2. TRIAL: unsuccessful motion for directed verdict: non-waiver.

be directed in his favor. This motion was overruled, and other testimony introduced. In failing to renew the motion at the close of all the evidence, the error in overruling the first-named motion, if any, was waived. The sufficiency of the evidence, even then, might have been challenged by the request of an instruction directing that the verdict be for the defendant, or in a motion for new trial. *Warren v. Graham*, 174 Iowa 162; *Stoner-McCray System v. Manhattan Oil Co.*, 176 Iowa 630; *Hansen v. Hough*, 177 Iowa 93; *Heiman v. Felder*, 178 Iowa 740. Such instruction was requested, and the point also was raised in the motion for new trial.

III. Objection was made to the reading to the jury by counsel for the plaintiff of "Extracts from the Evidence of Witnesses," and this was overruled by the court, with the

3. TRIAL: argument: reading extracts from testimony.

remark: "You may read the extracts from the record if you have them." The ruling finds approval in *McConkie v. Babcock*, 101 Iowa 126. There was no abuse of discretion in permitting such extracts to be read. The transpo-

sition of the names of the parties in one of the instructions could not have prejudiced either. *Reupke v. Stuhr & Son Grain Co.*, 126 Iowa 632.

IV. In the third paragraph of the charge, the court directed the jury that there were two grounds of negligence:

(1) That defendant was driving his car on the wrong side of the road; and (2) that he was not "giving the care and attention to the operation of his automobile that an ordinary, careful, and prudent man would give under like circumstances." Exception was taken thereto, for that, it is said, the second ground was not included in the petition. Therein it is alleged that:

4. NEGLIGENCE:
pleading: para-
phrase by the
court.

"The defendant carelessly, negligently, and without regard to the safety of those passing upon the highway, drove the car which he was in, in such a careless and negligent manner, and on the wrong side of the public highway, that the car that he was driving was run into the car the plaintiff was in, * * * throwing her out, knocking out her teeth, breaking her ribs, and causing her other and permanent injuries."

Plainly enough, this states two charges of negligence: i. e., that the defendant drove his automobile (1) in a careless and negligent manner, and (2) in a prohibited place, namely, on the wrong side of the highway; and, if he did either, resulting in plaintiff's injury, he was negligent. The petition might have been made more specific, but it was not assailed; and, if the defendant operated his car in a negligent manner, to plaintiff's injury, he was quite as liable as though this had resulted from keeping on the left side of the traveled way. There was no error in the instruction.

V. Exception was taken to this language, found in the seventh instruction:

"Contributory negligence is such negligence on the part

5. NEGLIGENCE :
contributory
negligence :
unusual defini-
tion.

of one injured as helps to produce the injuries complained of."

The precise objection to this language is not disclosed, and we are unable to appreciate the defect therein. Though not in the language ordinarily employed, it is such as might not have been misunderstood, especially in view of other instructions cautioning the jury that, in order to recover, plaintiff must have been without contributory negligence. There was no error.

VI. Ten exceptions were taken to the 23d instruction, which, in so far as criticised, reads:

"If you find, from a preponderance of the evidence, that the plaintiff is entitled to recover, then you will determine the amount of damages, if any, that she has sustained. In determining such damages, you should take into consideration the mental and physical pain, if any, suffered by the plaintiff, and occasioned by the injury complained of, her health and the condition thereof before the injury complained of, and the effect, if any, of said injury on her health; and, in case you find that the plaintiff has, to any extent, been permanently injured, you should take that into consideration in determining her damages. You cannot allow the plaintiff anything for loss of time from the time of the accident until she reaches the age of 18, and you cannot allow her for loss of time in any amount, unless you find that she has sustained a permanent injury from this accident, of such a character as will reasonably be expected to interfere with her work, and cause her to suffer loss of time after she has reached the age of 18 years; and, if she has established, by a preponderance of the evidence, a permanent injury of such a character as will interfere with her work after she reaches the age of 18, and cause her damage by loss of time, then such loss of time after she reaches the age of 18 years is an element that you should take into consideration in reaching your verdict. Another element

that you may consider, under this question of permanent injury, are the scar or scars on the person of the defendant which would tend to disfigure her and detract from her general appearance, if any such there are. Another matter that you may take into consideration, if proven, by a preponderance of the evidence, that it was caused by the accident in question, is the claimed interference with and irregularities of plaintiff's menstruation."

The first of the exceptions is that "it is not a correct statement of the law." This is not sufficiently definite to comply with Chapter 24 of the Acts of the Thirty-seventh

6. **TRIAL: instructions: exceptions.**

General Assembly, exacting that "all such exceptions shall specify the part of the instructions as excepted to, or of the instructions asked and refused and objected to, and the grounds of such objections."

Exception b, that "there is no competent evidence of any permanent injury," is disproved by the evidence, without dispute, that the scar on the chin of plaintiff is per-

7. **DAMAGES: permanent injury: life tables not essential.**

manent. Exception c is that no life table or evidence of expectancy was shown, and d, that no evidence was adduced upon which a finding of how long the plaintiff would live could be based. Such evidence was not necessary; for the introduction of life tables in evidence is not essential to the recovery of damages for permanent injuries. *Beems, Admr., v. Chicago, R. I. & P. R. Co.*, 67 Iowa 435. Plaintiff had not attained her majority; and the jury, in estimating the damages consequent on permanent injury, has taken into consideration her age, condition of health, the probable age of her parents (both of whom testified), and all other matters bearing upon the probable duration of her life.

Exception e, that there was no evidence of any damages resulting from permanent injuries, is not well taken;

for, surely, damages were recoverable for causing the disfigurement of her chin. Exception f was to that part of the instruction telling the jury "not to allow her for loss of time in any amount, unless you find that she has sustained permanent injury from the accident," and for that there was no evidence of permanent injury to the plaintiff. The objector evidently intended to say that there was no permanent injury, such as would cause incapacity to labor or earn money. The jury might so have found. On the other hand, they might have accepted the testimony of plaintiff that she had been unable to work, up to the time of the trial; that her back and side still pained her; and that she was troubled with menstrual irregularities, and therefore have concluded that she would not fully recover, prior to reaching the age of 18. No objection was raised to the introduction of evidence of the wages received by plaintiff prior to the injury. Such proof was admissible only as tending to establish probable loss in earning capacity after she attained her majority. Such evidence was admissible on no other theory in the case; and, inasmuch as the defendant raised no objection thereto, we might well conclude that, as both treated the issue as to loss of time as involved in the case, there was no error in submitting the same. However, the petition did allege that the plaintiff was permanently injured, and prayed for damages; and this was sufficient to warrant recovery for depreciation in earning capacity. *Bailey v. City of Centerville*, 108 Iowa 20; *Camp v. Chicago G. W. R. Co.*, 124 Iowa 238; *Scott v. O'Leary*, 157 Iowa 222. Exceptions g and h have been disposed of by what has been said. Exception i relates to that portion of the instruction relating to the irregularity of plaintiff's menstruation, it being said that the record fails to show that this was the result of the injuries. The physicians

8. DAMAGES: permanent injury and loss of earning capacity.

testified that such trouble might have resulted from the collision. Plaintiff swore that she had had no difficulty therein, previous to the injury, but that she had suffered from such irregularity since. No other cause having been shown, the jury might have found that the irregular menstruation was consequent on the injuries suffered.

The propriety of allowing the jury to "take into consideration the mental and physical pain, if any, suffered by plaintiff, and occasioned by the injury complained of," is challenged, for that the petition contained no allegation thereof. Such pain, however, is the natural and inevitable result of injuries such as alleged, and might be included, in measuring the damages, without specific reference thereto in the pleading. *Gronan v. Kukkuck*, 59 Iowa 18; *Ousley v. Hampe*, 128 Iowa 675; *Worex v. Des Moines C. R. Co.*, 175 Iowa 1. The language quoted is in the past tense, and does not authorize recovery for pain which may be suffered in the future.

Appellant contends that the verdict for \$1,150 was excessive. The evidence was such as to preclude any interference with the finding of the jury. That several of her lower teeth were knocked loose, and one of them broken; that her lip was cut, and her shoulder bruised, was conclusively established. One of her physicians did not recall that the lip had been sewed; but the other, who examined her about a week later, thought it had been "repaired." The former examined her shortly before the trial, and thought her teeth solid, but stated that she complained of her chest, and menstrual periods. Both were of the opinion that irregularity in her menstrual periods might have resulted from the injury, and were agreed that there were many other causes for such difficulty. The physician exam-

9. DAMAGES: permanent injuries and mental and physical pain.

10. NEW TRIAL: verdict: excessiveness: \$1,150.

ining her about a week after the injury found a slight bruise across her hips and a discoloration on her ribs. The other did not examine her person in these parts, and said she did not complain of such injuries. One physician, Myrtle Griffin, was of the opinion that "the mark on her hip will decrease, as time goes on. It will probably be there always, but it will get less, as it gets older. If her jawbone is not injured, and her teeth get proper treatment, I think they will be as sound and solid as they were before the accident. Her nervousness is apt to be caused by such an accident."

Plaintiff's mother testified that she complained all the time that her right side and back hurt her. Plaintiff thought some of her ribs were broken loose; but this was not discovered by either physician. She also swore that her hip still hurt her; that one tooth was "knocked off," and her teeth were sore and somewhat loose; and that the scar on her chin and arm were still sore; and that her arm "gets kind of numb sometimes;" that the scar on her chin is visible; and that her side pained her all the time; that she had been nervous, ever since the injury; and that her menstrual periods had been irregular since then; that she had been unable to work, since her injury. She also testified as to the amount she was earning prior thereto. The evidence that she was in an entirely healthy condition, prior to the injury, was uncontroverted. The jury, then, might have found that she was injured, as recited; that she suffered pain up until the time of the trial; that she was incapacitated, to a considerable extent, from earning money; and that she was permanently disfigured. We are not ready to say that the amount allowed was more than sufficient to compensate her for the injuries received.—*Affirmed*.

EVANS, PRESTON, and SALINGER, JJ., concur.

B. D. BANKS, Appellee, v. F. N. LOHMEIER, Appellant.

ANIMALS: Distrain—Burden on Distrainor. Ownership of dis-
1 trained stock being shown, a presumption arises that such
owner is entitled to the possession, unless the distrainor af-
firmatively establishes every fact making distrain legal: i. e.,
the distrainor of stock on a public highway must show (1) that
the stock was *not* there for travel or for driving, or (2), if it was
there for such purpose, that it was *not* under the "immediate
care and efficient control of the owner." (Sec. 2314, Code, 1897.)

REPLEVIN: Formal Allegation of Cause of Detention. Plaintiff's
2 formal allegation in replevin of "*the facts constituting the al-*
leged cause of detention" by defendant creates no issue—re-
quires no negating evidence by plaintiff.

ANIMALS: Distrain—Proper Jurisdiction of Trustees. The right-
3 fulness of a distrain of stock is for the courts to decide—not
for the township trustees.

Appeal from Clinton District Court.—M. F. DONEGAN,
Judge.

MARCH 16, 1920.

ACTION to replevin stock distrained under the author-
ity of Section 2314 of the Code of 1897. Judgment for the
plaintiff. Defendant appeals.—*Affirmed.*

Wolfe, Wolfe & Claussen, for appellant.

W. H. Palmer, for appellee.

GAYNOR, J.—This is an action in replevin, in which the
plaintiff seeks to recover the possession of two Jersey cows.
He alleges that he is the owner, and entitled to their pos-
session. He also makes the formal allega-
1. **ANIMALS:** tions required by the statute, to wit, that
distrain: bur- they were not taken from him on a judg-
den on dis- ment or order of a court against him or
traintor.

against the property, and states his best belief as to the claimed cause of detention.

Defendant answered that the cows were running at large, and trespassing upon the highway and upon his property, and that, acting under the statute, he distrained them, and holds under the statute authorizing such distraint; that, within 24 hours thereafter, he notified the plaintiff of that fact; that plaintiff refused to pay the damages; that, thereafter, he called the trustees of the township together, and had the damages assessed, and that plaintiff still refuses to pay.

The statute under which defendant justifies his withholding of the property from the plaintiff is Section 2314 of the Code of 1897, which reads:

"Swine, sheep and goats at all times, and, during the time and as required by a police regulation adopted according to law, stock shall be restrained from running at large. Animals thus prohibited from running at large, when trespassing on land, or a road adjoining thereto, may be distrained by the owner of such land, and held for damages done by them, and for the costs provided in this chapter; but stock *shall not be considered as running at large so long as it is upon unimproved lands and under the immediate care and efficient control of the owner, or upon the public roads for travel or driving thereon under like care and control.*"

Code Section 2317 provides:

"Within twenty-four hours after an animal has been distrained, Sunday not included, the person distraining * * * shall notify the owner of the animal thereof, and, if he fails to satisfy the damages and costs, such person shall within twenty-four hours after such notice to the owner, verbally or in writing, request the township trustees to appear upon the premises to view and assess the damages. When two or more trustees have met, one of them having previously

informed the owner of the land of the time and place of meeting, they shall assess the damages and costs. If the owner of the distrained animal refuses or neglects for two days thereafter to pay the amount thus assessed, one of said trustees shall put up in three conspicuous places in the township notices, describing the property, and naming a time and place of sale, which place shall be where the property is distrained, and time not less than five nor more than ten days thereafter, that said property will be sold between the hours of one and three o'clock in the afternoon."

Code Section 2318 provides the manner of making and prescribing the assessment, and directs the place where the same shall be filed and recorded, and further provides that the person aggrieved by the action of the trustees may appeal to the district court of the county.

This cause was submitted on a stipulation of facts. Among the facts conceded, we find that the plaintiff, at the time this action was commenced, was the owner of the property in controversy. The fact of ownership draws with it the right of possession. If nothing further appeared, the law raises the presumption that plaintiff is entitled to the possession of it, as against the world. As said in *Cassel v. Western Stage Co.*, 12 Iowa 47, which was an action in replevin:

"Title to personal property ordinarily carries with it the right to the possession. And yet it is true that the title may be in one person, and the right to the possession in another. In such action it is unnecessary, even if plaintiff claims possession, as resulting from his ownership, that he shall so state. It is sufficient for him to allege his right to the possession, and maintain this by proof of ownership, which, in the absence of proof to the contrary, carries with it the other right."

So the concession in the stipulation that the plaintiff

is the owner of the property, makes a prima-facie case for the plaintiff of right to the possession, and, in the absence of proof to the contrary, establishes in the plaintiff the right to the possession.

It is true that plaintiff, in his petition, stated his belief as to the alleged cause of detention. This, however, is a merely formal averment, and only made necessary by the statute. It does not make an issue, and

2. REPLEVIN:
formal allegation
of cause
of detention.

does not require the plaintiff to negative the alleged cause of detention. The real question between the parties in all replevin suits is, Who is entitled to the possession of the property at the time the suit is brought? It will be noted that the statute (Section 4163 of the Code of 1897) does not require the defendant to allege that the detention was wrongful. In the Code of 1851, such allegation was necessary; and, in *Draper v. Ellis*, 12 Iowa 316, it was held that the wrongful detention is the gist of the action, and a failure to allege in the petition that the property was wrongfully detained, may be taken advantage of by demurrer, or by motion in arrest of judgment. Under the Code of 1851, under which that decision was made, it was necessary for the plaintiff to allege that the property was wrongfully detained, and, therefore, necessary for him to prove that the detention was wrongful. See *Kennedy v. Roberts*, 105 Iowa 521. Under the statute as it now is, he is only required to allege the facts constituting his right to the possession. Upon proof that he is the owner of the property, the right to possession follows, as a legal consequence of the ownership, and *prima facie* establishes such right.

Now, if we start with the proposition that it is conceded that plaintiff was the owner of this property, it follows logically that he is entitled to the possession of it, unless the defendant affirmatively establishes the facts on which he relies to defeat the right to the possession. The

only statement in the stipulation of facts bearing upon this branch of the case is that said cattle were distrained by the defendant *while on the road or public highway, where the said highway passes the land of the defendant*, and that plaintiff had been watching the cows from inside his yard, but went to slop his hogs, and was gone from 5 to 7 minutes, during which time the defendant took the cows. It will be noted from the statute that the right of the defendant to distrain and hold these cattle depends upon the existence of the facts found in the statute which authorizes him to do so. These facts are as follows: (1) That the animals were prohibited from running at large, either by the express terms of the statute, or by a police regulation adopted according to law, distraining stock from running at large. On this point, we find the stipulation saying that "the so-called herd law was in effect in Clinton County at the time these cattle were distrained;" so we may assume that stock generally were distrained from running at large, by police regulation, at the time this distraint was made. (2) Were the stock running at large at the time the distraint was made? The statute provides that animals prohibited from running at large, in violation of the inhibition, may be distrained by the owner of land, and held for damages done by them, and for costs, *when trespassing on his land or on a road adjoining thereto*. The mere fact that the cattle were on a road adjoining defendant's land does not, in and of itself, justify his distraining them under the statute, even though prohibited from running at large; for there is a further limitation upon this right. To justify the distraint, it must appear, not only that they were on the road at a place that justified distraint, but that they were not under the immediate care and efficient control of the owner; for the statute says that "stock shall not be considered as running at large so long as it is * * * under the im-

mediate care and efficient control of the owner," from which we read that the mere fact that cattle prohibited from running at large are found on a public road does not, of itself, justify distraint; for, if they are upon the public highway for travel or driving, under the immediate care and efficient control of the owner, they are not subject to distraint. The same statute which creates the right to distraint places limitations upon that right, and the person who seeks to exercise the right must, to justify the exercise of the right, negative these limitations. It follows that he must affirmatively show, not only that they were on the public highway, but that they were not there for travel or driving, under the immediate care and efficient control of the owner. The stipulation simply shows that they were on the road on a public highway, where said highway passes the land of the defendant. It does not show that they were not there for travel or driving, and it does not show that they were not under the immediate care and efficient control of the owner. The stipulation says that the plaintiff was watching the cows, from inside his yard, immediately preceding the distraint, but went to slop his hogs, and was gone from 5 to 7 minutes; that the defendant went to the place where the cattle were, and took them from the care and control of the owner; not that the owner permitted them to escape, or that they did escape from his care or control. It does not appear for what purpose these two cows were in the road. For aught that appears, they may have been there for the purpose of travel, or driving to pasture. So, at the threshold of this controversy, we are met with the proposition that the cattle were not running at large, and no affirmative showing that, while in the highway, they were not there for travel, or being driven; and it is not affirmatively shown that they were not under the immediate care and efficient control of the owner. These facts must affirmatively appear, to justify the distraint. Without an

affirmative showing of a right to distrain, the defendant cannot justify the distraint, as against the claims of the owner. Unless he does justify, the plaintiff's claim must prevail.

Township trustees have no authority or jurisdiction to determine the rightfulness of the distraint. Their only duty is to assess the damages, when the animals are rightfully distrained. The statute does not justify the trustees in determining, in any sense, the rightfulness of the distraint. The right to distrain must exist and be exercised, before trustees can take any action. The rightfulness of the distraint is properly determined in an action of replevin. See *Syford v. Shriver*, 61 Iowa 155.

Other questions are raised, touching the legality of the action of the trustees. The determination of this case does not require their consideration.

We find that defendant has not justified the distraint, and his action in taking up the stock was illegal, under the stipulation here submitted. The action of the court must, therefore, be—*Affirmed*.

WEAVER, C. J., LADD and STEVENS, JJ., concur.

CLYDE HANSON, Appellee, v. JACOB M. DICKINSON, Receiver, Appellant.

MASTER AND SERVANT: Workmen's Compensation Act—Re-
 1 **vival of Dormant Disease.** The Workmen's Compensation Act embraces recovery for all the natural consequences of an injury "arising out of and in the course of" an employment, even though the major part of such consequences results from a slight initial injury, fanning into life a pre-existing, dormant disease, i. e., gonorrhoea.

MASTER AND SERVANT: Pre-Existing Disease Aggravating Neg-
 2 **ligent Injury.** Principle recognized that one may not plead, in avoidance of his negligence, the diseased condition of his victim.

MASTER AND SERVANT: Workmen's Compensation Act—Occupational Disease and Injury Aggravated by Disease. The provision of the Workmen's Compensation Act that personal injury "shall not include a disease, except as it shall result from the injury," is intended to exclude *occupational* diseases from the category of personal injuries.

Appeal from Worth District Court.—M. F. EDWARDS, Judge.

MARCH 16, 1920.

THE claimant was awarded by the industrial commissioner an allowance for total disability during 44 weeks, and this was approved, on appeal by the railway company to the district court, and it has appealed to this court.—*Affirmed.*

F. W. Sargent and J. G. Gamble, for appellant.

Robinson & Boomhower, for appellee.

LADD, J.—Clyde Hanson, while employed by the Chicago, Rock Island & Pacific Railway Company, in its shops at Manly, as boiler maker, was injured, July 25, 1916, when putting a patch on the crown sheet of an engine. Having ground a chisel on the end, so that it would fit "into the round part of the cotter key," he put it in the key, and "was forcing it, when his hammer slipped off the chisel, and struck his left leg on the inside, just below the knee cap." This caused a red spot, and black and blue coloration about it; but he thought it would get all right. Instead, it grew worse, until, in the early part of August, he consulted Dr. Powell, who found a small bruise, redness covering two or three inches in diameter, and the knee swollen. About the 24th of the same month, he was examined by Dr. Westly, who testified that the knee joint was inflamed and swollen; that he opened same, and made a microscopic examination of the substance which came from the joint, and that it contained gonococci. He concluded that he had gonorrhoea.

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Workmen's
Compensation
Act: revival
of dormant
disease.

arthritis. The doctor was unable to say whether the condition had been accelerated by the injury, and was of opinion that the condition might have come on without a trauma, but he could not say. Dr. Graham examined Hanson at the same time, and found conditions as recited above. They agreed that the X-ray did not show a fracture of the bone, but Dr. Graham swore that it revealed a disease of the bone, and pus. The latter advised the removal of the dead piece of bone, which was done, and left a depression. He massaged the prostate gland, which also contained gonococci, and was of the opinion that the surrounding of the bone by pus was the result of gonorrhoeal infection, and that "hidden gonorrhoea can be lighted up by a bruise," and in other ways. Dr. Powell expressed the opinion that gonorrhoeal trouble, such as has been mentioned, could "be caused by trauma or other things; anything that would devitalize tissue would cause such a condition." Hanson filed his claim for compensation during 44 weeks, May 5, 1917, and, as liability was denied, it was submitted to arbitrators, who found against the company. On review, the industrial commissioner confirmed the finding of the arbitrators, as did the district court, on appeal. The contention of appellant is that the record does not warrant the finding that the injury was the proximate cause of his disability, as found by the arbitrators. Apparently, the injury was slight. It did not break the skin, but did bruise it, and probably the tissues, such as were there; and it must be conceded that, but for the disease, the injury probably would not have proven serious, nor have resulted in prolonged disability. Nevertheless, he suffered personal injury, though slight, "arising out of and in the course of his employment" by the railroad company. The Workmen's Compensation Act, Section 2477-m *et seq.* of the Code Supplement, 1913, covers any and all personal injuries. The disease with which he was afflicted might have been found

to have been dormant, since dried up by treatment, about six years previous, and to have awakened into activity, shortly after the injury. That its activity during the two months following the injury was such as to infest the knee joint and prostate gland with gonococci bacilli does not obviate this conclusion. Dr. Powell expressed the opinion that anything that would devitalize tissue would cause gonorrhoeal trouble, such as experienced by the plaintiff, and Dr. Graham was of the opinion that "hidden gonorrhoeal trouble can be lighted up by a bruise." Though both physicians indicated that there might be other causes, the record is void of any evidence suggesting any other than the injury; and, as we think, there was some evidence sustaining the industrial commissioner's conclusion that the disease was lighted up or accelerated by the hammer's accidentally slipping from the chisel and striking complainant. See *Brownfield v. Chicago, R. I. & P. R. Co.*, 107 Iowa 254. This being true, the courts may not interfere with such finding. *Griffith v. Cole Bros.*, 183 Iowa 415. Counsel for appellant contends, however, that, inasmuch as complainant's condition "did not result from the injury," but is so through dis-

ease, there was no liability. The decisions are quite generally to the contrary. 2. MASTER AND SERVANT: pre-existing disease aggravating negligent injury. as counsel admits. The trend of opinion is in accord with what was said in *Crowley's Case*, 223 Mass. 288 (111 N. E. 786):

"The material evidence before the arbitration committee, submitted without the introduction of further testimony to the industrial accident board upon review, warranted the findings that the employee had a pre-existing constitutional disease, known as syphilis, which, being dormant, left his ability to perform the arduous work for which he was hired unimpaired, and that, because of the nature of the accident arising out of and in the course of employment, his nervous system suffered a shock sufficiently severe to

aggravate and accelerate this condition, until general paralysis or insanity resulted, depriving him of all capacity for work in the future. The statute prescribes no standard of fitness to which the employee must conform, and compensation is not based on any implied warranty of perfect health or of immunity from latent and unknown tendencies to disease, which may develop into positive ailments, if incited to activity through any cause originating in the performance of the work for which he is hired. What the legislature might have said is one thing; what it has said is quite another thing; and, in the application of the statute, the cause, or partial or total incapacity may spring from and be attributable to the injury, just as much where undeveloped and dangerous physical conditions are set in motion, producing such result, as where it follows directly from dislocations or dismemberments, or from internal organic changes, capable of being exactly located."

See, also, *State v. District Court of St. Louis County*, 137 Minn. 435 (163 N. W. 755); *City of Milwaukee v. Industrial Com.*, 160 Wis. 238 (151 N. W. 247); *Hartz v. Hartford F. Co.*, 90 Conn. 539 (97 Atl. 1020); *Winter v. Atkinson, etc., Co.*, 88 N. J. L. 401 (96 Atl. 360); *Ramlow v. Moon Lake Ice Co.*, 192 Mich. 505 (L. R. A. 1916 F, 955). Like decisions by commissioners of the several states will be found collected in Bradbury's *Workmen's Compensation* (3d Ed.) 566.

The law is well settled that one predisposed to disease which is aggravated or accelerated by a negligent injury, is entitled to recover damages necessarily resulting from such aggravation or acceleration. In other words, the previous condition of the person injured cannot be invoked by the defendant for the purpose of escaping the consequences of his own negligence. The duty of exercising care to avoid injury to the weak and infirm is precisely the same as toward the strong and healthy; and, when that duty is vio-

lated, the measure of damages is the injury inflicted, even though the injury might have been aggravated, or might not have happened at all, but for the peculiar condition of the person injured. *McCahill v. New York Trans. Co.*, 201 N. Y. 221 (48 L. R. A. [N. S.] 131, and extensive note in which the cases are collected, at page 119). The Workmen's Compensation Act dispenses with the necessity of any showing of negligence, contributory negligence, and the like, and adopts as the standard or condition that the injury must have been personal, and have arisen "out of and in the course of the employee's employment." The act does not purport to deal with the consequences, save as these may fix the compensation to be paid by the employer, and there is no tenable reason for modifying the rule as to liability which obtained at the common law. It is urged, however, that, under the definition "personal injuries," in Paragraph g in Section 2477-m16 of the Code Supplement, 1913,

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and injury ag-
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disease.

a pre-existing disease ought not to be considered, even though "lighted up" or accelerated by the injury. The paragraph reads:

"They [personal injuries] shall not include a disease except as it shall result from the injury."

In the English Act, as well as those of most of the states, the remedy provided is for "personal injury by accident," and this is held to exclude diseases other than those in consequence of the injury. Manifestly, the term "personal injuries" is of much broader significance than "personal injury by accident." It comprehends a great number of injuries, many of which will be found enumerated in *Hurle's Case*, 217 Mass. 223 (Ann. Cas. 1915C 919), and in *Madden's Case*, 222 Mass. 489 (111 N. E. 379). The manifest design of the general assembly, in providing that the term "personal injuries" should not include a disease, was to eliminate

occupational diseases: that is, those which are incidental to or result from the occupation in which the employee is engaged. In a sense, these may be said to "arise out of and in the course of the employment," but usually are covered by increased compensation of the employee. Nor can it be said that the injury claimed for includes the disease with which he was afflicted. What is claimed for is injury as inflicted by the accidental slipping of the hammer and the natural consequences flowing therefrom and traceable thereto; and, as said, this might have been found by the industrial commissioner to be the "lighting up" or accelerating of the dormant disease. The claim is not based on the disease, but on what the bruise did to the disease. *In re Bowers*, (Ind.) 116 N. E. 842; *Madden's Case*, supra. Cases like *Voelz v. Industrial Com.*, 161 Wis. 240 (152 N. W. 830), *McCoy v. Michigan Screw Co.*, 180 Mich. 454 (147 N. W. 572), and a commissioner's decision, *Spangler v. Philbin*, 2 Cal. Indus. A. C. 170, in each of which the holding was that there was no causal connection between the disease and injury shown, are not in point. Here, the industrial commissioner found that claimant's injury, though not severe, was the proximate cause of this condition, and we are of the opinion that the record was such that we may not interfere with his conclusion.—*Affirmed*.

WEAVER, C. J., GAYNOR and STEVENS, JJ., concur.

IN RE ESTATE OF W. H. CAMP et al.

NORMAN J. BATES, Appellee, v. E. Y. THOMAS, Administrator,
Appellant.

EXECUTORS AND ADMINISTRATORS: Notice of Appointment—

- 1 **Failure to Secure Direction of Clerk or Court.** Notices of the appointment of administrators must be ordered or directed by the court or clerk, in order to start the running of the statute of limitation on claims.

LIMITATION OF ACTIONS: Pleading—Burden of Proof. A plea
2 of the statute of limitation is an affirmative plea, necessitating proof by the pleader of every fact essential to show the bar. So held where the pleader failed to prove that the published notice of the appointment of an administrator was ordered or directed by the court or clerk, as required by Sec. 3304, Code, 1897.

EXECUTORS AND ADMINISTRATORS: Claims—Related Presen-
3 **tation.** The fact that a claim was not ascertainable until long after the expiration of 12 months from the publication of the administrator's notice of appointment, coupled with the fact that the estate is solvent, presents such equitable circumstances as will let in a claim after all other claims are barred.

Appeal from Guthrie District Court.—J. H. APPLGATE,
Judge.

MARCH 16, 1920.

ACTION to enforce a claim against an estate. Opinion states the facts. Verdict and judgment for the plaintiff. The administrator *de bonis non* appeals.—*Affirmed.*

J. E. Batschelet, for appellant.

E. D. Sampson, Earl W. Vincent, C. P. Knox, Sayles & Taylor, Ed. R. Brown, and F. O. Hinkson, for appellee.

GAYNOR, J.—W. H. Camp died testate, on or about January 31, 1910, leaving surviving him his wife, Amanda Caroline Camp. His will contained the following provisions, so far as material to this case:

1. **EXECUTORS AND ADMINISTRATORS: notice of appointment: failure to secure direction of clerk or court.** "1st. I direct that my just debts and the expense of my last sickness and burial be paid.

"2d. Subject to the foregoing, I give, devise and bequeath unto my beloved wife, Amanda Caroline Camp, all property, of whatsoever character or wheresoever situated, that I may own at the time of my death; subject only to the following provision: It is

understood that my said wife shall have all income arising from all of my said property. She shall have the right to sell, exchange, transfer or assign the same, and to invest or reinvest the proceeds of all of my property, as she sees fit to do, and to use any part or portion of said property for her support and maintenance. At the time of her death, if any of said estate has not been used or expended by her during her lifetime, then I will and direct that one half of the residue so remaining shall go to my nearest relatives, share and share alike, and the other half be disposed of by my said wife as she may see fit."

This will was duly admitted to probate on the 16th day of February, 1910. Testator's wife, Amanda Caroline Camp, was duly appointed executrix, and on her own motion published in the Guthrie County Times, a newspaper printed and published in said county, the following:

"Notice is hereby given that the undersigned was duly appointed and qualified as executrix of the estate of W. H. Camp, late of Guthrie County, Iowa, deceased, on the 26th day of February A. D. 1910. All persons indebted to said estate are requested to make immediate payment to the undersigned; and those having claims against said estate will file the same duly verified with the clerk of the district court of said county for allowance. Dated May 2, 1911."

Proof of the publication was made by the publisher of said paper, the first publication being on the 4th day of May, 1911, the second on the 11th day of May, 1911, and the third on the 18th day of May, 1911. No direction for the publication of this notice is shown, as required by Section 3304 of the Code of 1897.

Thereafter, Amanda Caroline Camp entered upon her duties as executrix of said will, and on the 6th day of October, 1915, her final report came on for hearing; and, upon a hearing, she was discharged from further duties as executrix.

Amanda Caroline Camp died on the 1st day of January, 1917, intestate. The only property left by her was that which came into her hands from the estate of W. H. Camp, under the will of W. H. Camp, hereinbefore referred to. Thereafter, E. Y. Thomas was appointed administrator of her estate, and also administrator *de bonis non*, with the will annexed, of the estate of W. H. Camp, deceased. On the 8th day of September, 1917, this claimant, Norman J. Bates, filed in the district court of Guthrie County his claim against the estate of W. H. Camp, and, after stating the facts aforesaid, alleged: That he is the owner of and entitled to receive at the hands of the administrator of said estate one half of the property of W. H. Camp now in the hands of the administrator *de bonis non*, with the will annexed; that same is in the form of moneys and credits and personal property, the exact amount of which he is unable to state; that he makes this claim under a verbal agreement entered into between W. H. Camp and one A. R. Bates, brother of the claimant, wherein it was agreed by W. H. Camp that, if this petitioner, then an orphan, about 13 years of age, would stay with and make his home with said W. H. Camp and Amanda Caroline Camp, and work and be a good boy until he was 21 years of age, then the said W. H. Camp would give him, and he should have as his compensation therefor, one half of all his property, when they, the said W. H. Camp and Amanda Caroline Camp, were through with it; that he accepted this offer, and entered into the employ of W. H. Camp thereunder, and stayed with him and Amanda, and worked and labored faithfully for them and in their behalf, under said agreement, until he was 21 years of age; that neither W. H. Camp nor Amanda had any children of their own; that he accepted the terms and conditions of the contract so made with W. H. in good faith, believing that he would do as he agreed; that he relied upon this promise and agreement, and never demanded or ex-

acted or received any compensation from the said W. H. for his services so rendered, depending entirely upon said agreement that he should receive one half of the property of the said W. H. Camp when he and his wife, the said Amanda Caroline Camp, were through with it, as compensation therefor. He alleges that he has fully performed all the terms and conditions of the contract on his part, and is now entitled to one half of the said property in the hands of the administrator belonging to the estate of W. H. Camp, and prays for an order authorizing and directing the said administrator to turn over to him one half of the property so in his hands, in fulfillment of said agreement.

The administrator of the estate of Amanda Caroline Camp, the administrator *de bonis non* of W. H. Camp, and the heirs at law of both Amanda and W. H., are parties to this suit, and joined issue with the plaintiff on his claim made; and, among other issues tendered, say that the claim was not filed within one year after notice of the appointment of the executrix of the estate of W. H. Camp, and that the claim is now barred.

The cause was tried to a jury upon the issues tendered, and a verdict returned for the claimant. E. Y. Thomas, administrator *de bonis non*, with the will annexed, of the estate of W. H. Camp, alone appeals.

There was abundant evidence to establish the contract relied upon. The evidence fully sustains the claim that the services required of claimant to be performed on his part were fully performed. No question is made on this appeal on either of these propositions. No question is made as to the amount allowed. No complaint is made of any action of the court during the trial, or the manner of its submission to the jury. The only contention here is that the undisputed evidence shows that plaintiff is not in a position to maintain this action, because his claim is barred by the statute of limitations; and this is predicated on the

thought that he did not file his claim within one year after notice of the appointment of the executrix, and has shown no equitable or reasonable excuse for not doing so. There is no suggestion that the claim is barred by the general statute. The right of action did not accrue until after the death of Amanda, which did not occur until January 1, 1917.

The statute invoked is Section 3349, Code, 1897, and it reads as follows:

"All claims of the fourth of the above classes, not filed and allowed, or if filed and notice thereof, as hereinbefore provided, is not served within twelve months from the *giving of the notice* aforesaid, will be barred * * * unless peculiar circumstances entitle the plaintiff to equitable relief."

Claims of the fourth of the above classes, referred to in the statute, are debts not entitled to preference under the laws of the United States, public rates and taxes, and claims filed within six months after the first publication or posting of notice. The notice referred to in the statute is the notice required by Code Section 3304, which provides:

"The executors or administrators first appointed and qualified for the settlement of the estate shall, within ten days after the receipt of their letters, publish such notice of their appointment *as the court or clerk may direct*, which direction shall be endorsed upon the letters when issued."

The real question, therefore, and the only question presented to us for consideration, is whether the claim is barred by the statute of limitations—barred by that statute which limits the time within which claims may be filed and proved against an estate to twelve months from the giving of the notice of the appointment.

It will be noted that the claim was not due or payable until after the death of Mrs. Camp; that she did not die until the 1st day of January, 1917. The claim was filed on the 8th day of September, 1917. The notice of the ap-

pointment of Mrs. Camp was insufficient to start the running of the statute. It will be noted from the statute that it is the duty of the executor or administrator to publish such notice of their appointment *as a court or clerk may direct*. It does not authorize them to publish any notice which the judgment of the executor deems sufficient. The court or clerk must direct the notice to be given. This has a purpose. The statute does not say where the notice shall be published. It is not for the administrator to choose the instrument through which the information required to be given shall be published. He must go to the court, and get the court's direction or the clerk's direction, and follow that direction in the publication of the notice, to the end that the notice may be published in such a way and in such manner as it will best serve the purposes for which the notice is required.

The burden of proof is on the one seeking to avail himself of the statute of limitations, and this burden imposes upon him the duty of showing every fact essential to constitute the bar. Mere proof that a notice

**2. LIMITATION OF
ACTIONS:
pleading: bur-
den of proof.**

was published does not meet the requirements of the statute. He must show that a notice was published such as the statute requires, and that is, a notice published under the order or direction of the court or clerk. This direction must be endorsed upon the letters issued. No other notice will start the statute of limitations. The statute does not begin to run until twelve months from the giving of the notice such as the statute requires: that is, a notice published according to the direction of the clerk or court. There is no showing of any endorsement of any direction upon the letters, nor is there any evidence in the record showing that the notice of the appointment was given, as the statute requires. It is true that the record shows a publication of a notice and a proof of the publication of a notice; but it does not

appear that the notice published was one authorized to be published under the statute, one directed by the court or the clerk. That such direction is essential, see *Mosher v. Goodale*, 129 Iowa 719; *McConaughy v. Wilsey*, 115 Iowa 589, 590; *Craig v. Estate of Craig*, 167 Iowa 340. This last-named case was a proceeding to establish a claim against an estate. The defense was that the claim was not filed in time, and no equitable circumstances were shown, excusing the delay. Judge Deemer, speaking for the court, said:

"Under a previous decision of this court, appellants must fail, in any event, on this proposition; for their contention that the claim was not filed in time, and no proper notice given, is an affirmative defense, to be proved by them, and it nowhere appears in the record that the court or the clerk ordered notice of the administratrix's appointment to be given by publication. Without this order, service by publication, even if made, was of no validity; and, until proper notice of appointment is given, the statute as to the time of filing of claims does not begin to run."

See, also, *Ellyson v. Lord*, 124 Iowa 125, 130.

We might stop here, in our consideration of this case; but we may go further, and say that, under this record, the plaintiff's claim is a just claim. The estate is unsettled,

3. EXECUTORS AND
ADMINISTRATORS:
claims:
belated presentation.

and has ample funds in the hands of the administrator *de bonis non* to pay the same.

No prejudice results to the estate by reason of the time of presenting the claim. Our statute does not make a fixed and fast rule as to the time within which claims should be filed, but says that the claim may be filed after the twelve months, when peculiar circumstances entitle the claimant to equitable relief. Now, the record in this case shows affirmatively that the plaintiff's claim was not enforceable until after the death of Amanda Caroline Camp. It affirmatively shows that the amount to which plaintiff was entitled could not be ascer-

tained until after her death. The agreement was that he should receive one half of the property remaining at the death of the last survivor of the two parties named in the contract. Amanda Caroline Camp was the last. Until her death, the amount plaintiff was entitled to for the services rendered could not be determined. From the very nature of the will, it is apparent that it was the understanding and intention of the testator that his estate should not be finally closed until the death of Amanda Caroline Camp. Under the will, she had a right to the use of all the property, the right to dispose of it, and practically the same rights to it and over it that an owner had. There might be nothing left at her death. The amount plaintiff was entitled to could not be known until her death. This was an equitable reason for not seeking to enforce it before her death, especially in view of the fact that, under the will, and under her administration of the will, such as it was, the property was all kept intact, subject only to such disposition as she could rightfully make of it under the provisions of the will, to which disposition the plaintiff's claim was always subject. W. H., in his will, made provision first for the payment of all his just debts. These were paramount claims against his estate. He could not, by any testamentary disposition, remove his estate from these claims.

We think the appellant has failed to make good on the only contention urged here for reversal, and the judgment of the district court is, therefore,—*Affirmed*.

WEAVER, C. J., LADD and STEVENS, JJ., concur.

IN RE LAST WILL AND TESTAMENT OF JOHN LONGSHORE.

WILLIAM S. HEWS et al., Appellees, v. AMANDA B. LONGSHORE, Appellant.

WILLS: Foreign Probate of Domestic Will. The will of a domestic resident of this state will not be admitted to probate in this state on a duly authenticated record of probate in a foreign state. (Sec. 3294, Code, 1897.)

CONSTITUTIONAL LAW: Full Faith and Credit Clause—Foreign Probate of Domestic Will. The "full faith and credit" clause of the Federal Constitution imposes no obligation on the courts of this state to recognize the foreign probate of a domestic will.

Appeal from Poweshiek District Court.—D. W. HAMILTON, Judge.

MARCH 16, 1920.

THIS case involves an appeal from the action of the court in admitting to probate in this state a domestic will probated in a foreign state, on the production of the record of the probate in such foreign state.—*Reversed and remanded.*

J. H. Patton, for appellant.

Rayburn & Lyman, for appellees.

GAYNOR, J.—This is an appeal from the action of the court in admitting a will to probate under the provisions of Section 3294 of the Code of 1897. It appears that the testator was, at the time of his death, a resident of this state, owned large property interests in this state, and was domiciled at Grinnell, Poweshiek County, in this state; that he was temporarily in the state of Nebraska, and, while there, was taken sick and died. Eleven days be-

1. **WILLS:** foreign probate of domestic will.

fore his death, he executed the will now sought to be probated. At the time of his death, he was the owner of 160 acres of land in Richardson County, Nebraska. This will was presented to the probate court of Richardson County, Nebraska, and there duly probated. A certified copy of the record of probate, duly authenticated, as required by our statute, was presented to the district court of Poweshiek County, with an application to have the same admitted to probate upon the authenticated record aforesaid. The court admitted the will to probate as a foreign will, over the objection of parties interested, and appeal is taken to this court.

The only question for our determination is whether or not, under the provisions of Section 3294, the will should have been admitted to probate as the last will and testament of decedent.

There is no question made as to the probate in Nebraska. He had real estate in Nebraska, and the Nebraska court had jurisdiction to probate the will. There is no question that the original record of probate in said court was duly authenticated and attested, as required by the laws of this state. The determination of this case involves the proper construction to be given to Section 3294, its scope and purpose, and what is intended to be covered by it. This section deals only with foreign wills, probated in the court of the domicile of the testator: that is, where a will has been duly probated at the domicile of the testator, in a foreign state, it may be admitted to probate in this state as a foreign will, upon compliance with the terms of the statute.

In dealing with the subject of wills, and in considering the legal effect of the probate thereof, a distinction between domestic wills and foreign wills must always be kept in mind. When Section 3294 says, "a will probated in any other state or country shall be admitted to probate in this

state, without the notice required in the case of domestic wills," it means a will probated at the domicile of the testator in a foreign state, and when it says, "on the production of a copy thereof and of the original record of probate, authenticated," etc., it means the production of a copy of the will, properly probated, at the domicile of the testator in a foreign state. Wills so probated may be admitted in this state without notice, under the provisions of Section 3294. It follows that only such wills as are shown to have been probated at the domicile of the testator in a foreign state are admitted to probate in this state, under the provisions of this section. *Original probate* may be had in any state or territory in which the testator has property at the time of his death, although the testator was not domiciled in that state at the time of his death; but the mere production of the statutory evidence of the probate of a will in a state other than that of the domicile of the testator, though he have property in that state, does not entitle it to probate in this state, under the provisions of this section. The probate of a will in a state other than the domicile of the testator is strictly a proceeding *in rem*, and, while allowable, affects only the property and rights in that property within the jurisdiction of that state, and has no extraterritorial force. It is much like all proceedings *in rem*, in which jurisdiction is acquired, not *in personam*, but of the property alone. A court in all proceedings *in rem* of necessity determines the right of the party to the relief prayed for, but enters judgment only against the property within its jurisdiction. A judgment thus rendered will not serve as a basis for any proceeding in a foreign jurisdiction, and no rights *in personam* or *in rem* can be urged under such a judgment in a foreign state. It is not binding upon anything except the property and rights in the property against which it operates.

It follows that the probate of a will in any state or

territory, other than the domicile of the testator, does not serve as a basis for the probate of the will in the state of the domicile, under the provisions of Section 3294. It cannot be assumed that it was the intention of the legislature that a domestic will, the last will and testament of one domiciled in this state, can be probated in a foreign jurisdiction, and by such probate secure its admission here as a foreign will, without notice. Wills probated at the domicile of the testator, and presented to the probate courts of this state for probate, are treated as foreign wills, and are admitted to probate in this state under the statutes hereinbefore referred to. But a domestic will, admitted to probate in a state other than that of the domicile, is not a foreign will. It is simply a domestic will, probated in a foreign state, and is not admissible to probate in this state, under the provisions of the statute. If this were tolerable, it would follow logically that, if one domiciled in this state should die, leaving a will, this will, without being admitted to probate in this state, could be taken to a foreign state, no matter how far distant from the state of the domicile, and there probated, and, by such probate, bind the courts of the domiciliary state, without notice to parties interested. The logic of such holding would be that, though a person died domiciled in this state, with large property interests here, and but small property interests in other states far distant from the state of his domicile, his will might first be probated in any of the foreign states in which he had property, and by such probate, under Section 3294, be admitted to probate in this state, without notice to the persons adversely interested. As bearing upon the question here under consideration, see *Sturdivant v. Neill*, 27 Miss. 157, 165; *Bate v. Incisa*, 59 Miss. 513. The statute of Mississippi provides:

“Authenticated copies of wills proved according to the laws of any of the United States, or the territories

thereof, or any country out of the limits of the United States, and touching or concerning estates within this state [Mississippi], may be offered for and admitted to probate in said courts."

In the *Bate* case, the Supreme Court of Mississippi said:

"In the case we are now considering, the will is not such as the statute was passed for. The chancery court * * * did not have jurisdiction over an authenticated copy of it, but could only admit to probate the original will. [It appears that the will was probated in the courts of Tennessee.] * * * But, if the record of the probate of the will in Tennessee had shown that it was duly proved by the three attesting witnesses [as required by the laws of Mississippi], an authenticated copy could not have been admitted to probate here, because the statute does not embrace it."

It was further held that the provisional statute authorizing the admission of foreign wills, upon presentation of duly authenticated copies of the probate in a foreign state, related only to the probate of foreign wills of testators domiciled in the state in which the probate was had, and not to the probate of wills made by persons domiciled in the state of Mississippi, probated in a foreign state. It was said:

"This will was provable in Tennessee, whose courts had jurisdiction of it, as affecting property situated in that state; but, the domicile of the testatrix being in Mississippi, her will must be proved here according to our law, in order to be operative on property situated in this state."

The syllabus of the case reads:

"An authenticated copy of the probate in Tennessee of a will whose maker is domiciled in Mississippi, is not admissible to probate in this state under Code 1871, Section 1105, so as to operate on property here, although exe-

cuted in the foreign jurisdiction where the testatrix died. and where it operates on her property there situated."

In the case of *Succession of Gaines*, 45 La. Ann. 1237, the court had to deal with a question very similar to the one here, especially so far as the legal phase of this case is concerned. It seems that one Myra Clark Gaines died in the city of New Orleans, on the 9th day of January, 1885, leaving two wills, one dated New Orleans, January 8, 1885, and another dated New Orleans, January 5, 1885. These wills were presented for probate to the civil district court for the parish of Orleans. The will of January 5th was resisted, on the ground that it had been superseded by the will of January 8th, and was defective in form. Resistance was made to the will of January 8th on the ground that it was a forgery. These matters were tried out in the civil court, resulting in a finding and decree that the will of January 8th was fraudulent and forged, and not entitled to probate, and that the will of January 5th was defective in form, and, therefore, not entitled to probate, reserving, however, the right of the executors to propound the same for probate at the domicile of the deceased. Appeals were taken from this. While these appeals were pending in the Supreme Court of Louisiana, the will of January 5th was duly admitted to probate in the surrogate court of Kings County, New York, that being the domicile of Myra Clark Gaines at the time of her death. On the 11th day of December, 1892, a certified copy of the probate in the state of New York was submitted to the civil district court of the parish of Orleans, for admission to probate. Objections were made to its admission in the parish of Orleans, because it had been adjudged by the Orleans probate court that it was not a valid will, and not entitled to probate, and because Mrs. Gaines did not die in the state of New York, but died domiciled in the state of Louisiana, and had no property within the jurisdiction of the surrogate court of Kings

County, New York, and further, because the will was made in Louisiana, and rejected by its courts, and could, therefore, have no legal efficacy in Louisiana, though admitted to probate elsewhere. These objections were sustained by the civil district court of the parish of Orleans, and an appeal taken to the Supreme Court of the state. On appeal, 'it was found affirmatively that Myra Clark Gaines was, at the time of her death, an actual resident of and domiciled in Kings County, New York, at the time of her death; that she was temporarily in the state of Louisiana; that, while temporarily in Louisiana, the will in question was executed. The Supreme Court held that, when the surrogate court of Kings County rendered a decree, admitting the instrument dated January 5th to probate as the last will and testament, and the same was duly and legally such, that particular fact must be taken as fixed by the judgment, and given effect in the Louisiana court. The court, in discussing the case, said:

"The *domicile* of the deceased being the place of the opening of the home or mother succession,—the succession proper,—the court of that domicile is unquestionably authorized to have presented to it an instrument purporting to be the last will and testament of the deceased, and, after due proceeding and inquiry had, to determine whether it be such last will, under the laws of the place of the domicile. In the matter before us, the surrogate, in a proceeding to which the surviving executor and the legal heirs and next of kin of Mrs. Gaines were parties, had propounded before his court for probate the will of the 5th of January, 1885, and, after hearing, pronounced it the last will and testament of Mrs. Gaines, probated it, and ordered its execution."

The fourth ground of opposition assigned, and one which was sustained by the district court, was "that a will made in Louisiana and rejected by its courts, could have no effect in Louisiana, although it may be admitted to pro-

bate elsewhere." The court said:

"In maintaining this ground of opposition, refusing the application, and rejecting the will, we are of the opinion the court erred. * * * The question before him was not whether the instrument purporting to be Mrs. Gaines' will should be probated here, as a matter of original probate. That had been once attempted in his court, and failed, the court, however, properly recognizing the right of the parties in interest to propound it later for probate at the domicile. The parties in interest acted upon that suggestion. * * * When brought a second time before the civil district court, the case was presented under entirely different conditions, * * * the object of the demand being also essentially different. In the case at bar, the court was not called on to deal directly with and on the instrument as a matter still *in pais*, for the purpose of determining whether it was really the last will and testament of the deceased. The question had passed on to and been determined by a court competent and authorized to do so, and was merged in the judgment of that court. What the court was asked to do was to recognize and give effect to the judgment itself, and, as resulting from that judgment, to recognize and give effect to the adjudication made on it that a particular instrument, identified with and by the judgment, was really the last will and testament of Mrs. Gaines, made and executed according to the laws of the state in which she had her domicile, at the time of its making and at the time of her death."

The court further said:

"Her succession was instantly opened by the fact of her death at the place of her domicile. That result was totally independent of her having property at that time in the county of Kings, or in the state of New York. Whether, when she died, her succession was, as to its character, a legal or a testamentary one, was a question necessarily to

be determined at the place of legal opening. When the succession opened, it opened as a single and entire succession. The unity of succession was not destroyed by the fact that portions of the property might be located in different jurisdictions, and in different states, and because, from motives of public policy, or the operation of local laws, the property so situated might be withdrawn partially or entirely from the control of the laws of the state of the domicile, or subjected, for the same reasons, to special restrictions."

But, if probated in any other state than the state of his domicile, the probate has no extraterritorial force, and operates only upon the property within the jurisdiction of the court so probating, and an authenticated copy of such proceedings in probate, upon presentation in a foreign state, does not justify the probate of the will at the place of domicile.

Under authority and reason, therefore, we hold that the place of original probate is the place of domicile; that a probate in any other state than the state of the domicile can have no extraterritorial force; that such probate does not entitle the will to admission in the state of the domicile, even under the good-faith and credit clause, or under statutes such as we have in this state. We hold that the statute means no more than to say that the will of a nonresident, admitted to probate according to the laws of the state of his domicile at the time of his death, may be admitted to probate in this state upon the production of a duly authenticated copy of the probate, without other proof or notice. And further, we hold that the state of the domicile has original jurisdiction to probate.

This construction of the statute closes the door to possible fraud, such as we have suggested.

We think the court was wrong in admitting the will of

2. CONSTITUTIONAL
LAW: full faith
and credit
clause: foreign
probate of do-
mestic will.

John Longshore to probate in the district court of Poweshiek County, as a foreign will, upon the mere production of a certified copy of the record of the probate in a foreign state. We do assume, for the purposes of this contention, that the district court of Richardson County, Nebraska, had jurisdiction to probate this will. That jurisdiction rested on the thought that he had property in the state of Nebraska, which was affected by the will. But the admission to probate there affected only the property within the jurisdiction of that court, and the rights of the parties in the property within the jurisdiction of that court. The right to present the will for original probate in this state is not foreclosed.

For a further discussion of the question here under consideration, see note to *Tremblay v. Aetna Life Ins. Co.*, 97 Me. 347 (94 Am. St. 521, 558); also, *Sullivan v. Kenney*, 148 Iowa 361.

The case is, therefore, reversed and remanded, with directions to proceed further in harmony with the opinions herein expressed.—*Reversed and remanded.*

WEAVER, C. J., LADD and STEVENS, JJ., concur.

MCCLURG & WALKER, Appellees, v. M. L. McEVoy, Appellant.

APPEAL AND ERROR: Refusing to Compel Election and to Strike.

- 1 Appeal will not lie from a ruling refusing (1) to compel an election between counts and (2) to strike a count.

APPEAL AND ERROR: When Judgment Not Entered on Appeal.

- 2 Judgment may not be entered in the Supreme Court, following the dismissal of an attempted appeal from an order overruling a demurrer, on the theory that appellant is then in default for failure to answer, when the record reveals an order of the trial court, suspending all proceedings pending the attempted appeal.

*Appeal from Des Moines Municipal Court.—T. L. SELLERS,
Judge.*

MARCH 16, 1920.

DEFENDANT appeals from an order of the court overruling a motion to require plaintiff to elect upon which of two counts of his petition he relies, and to strike Count 2 thereof.—*Affirmed.*

Chester J. Eller, for appellant.

Casper Schenk, for appellees.

STEVENS, J.—Plaintiff, a copartnership, consisting of S. O. McClurg and W. B. Walker, alleged, in their original petition, that, on July 7, 1919, they entered into a written contract of agency with the defendant for the sale of a tract of land in Faribault County, Minnesota, providing “that, if second party should find a purchaser for above-described real estate on the following terms, \$29,400 net to said first party, that said first party shall execute good and sufficient warranty deed to said purchaser, and furnish abstract showing good title to said property, and pay second party commission. Second party shall have right to sell said land for more than the above-mentioned price per acre, with commission of \$750 for sale of the farm;” that, on August 6th following, plaintiff produced one T. J. Garvey as a purchaser, who signed a contract in writing, agreeing to purchase said real estate and pay therefor the sum of \$30,000, upon terms stated in the petition; but that defendant refused to consummate the sale, or pay plaintiff the agreed commission. On the 8th day of October following, plaintiff filed an amendment to its original petition, alleging that it also procured one W. H. Albee as a purchaser, who was ready, able, and willing, and

1. APPEAL AND
ERROR: refus-
ing to com-
pel election and
to strike.

agreed to buy said land and pay therefor the sum of \$32,500. upon terms set forth in said amendment to the petition. On the first count of the petition, judgment is asked for \$600; and upon the second, for \$750.

Defendant appeared, and filed a motion in two divisions. In the first division, he asked that plaintiff be required to elect upon which count of the petition he relied, for the reason that plaintiff was entitled to recover, if at all, upon but one count of the petition. In the second division, he asks that Count 2 of the petition be stricken from the files, for the reason that the allegations thereof are inconsistent with the allegations of Count 1; that plaintiff can, in any event, recover upon but one count of the petition, and that, as the original petition, which alleged a complete cause of action, was verified, plaintiff was estopped from pleading the matters contained in said Count 2. Both motions were overruled, and defendant, having obtained an order staying further proceedings in the court below, appealed therefrom.

I. The first contention of counsel for appellee is that an appeal does not lie from the ruling on the motion to require plaintiff to elect, nor from the ruling on the motion to strike, unless same be treated as a demurrer. Code Section 4101, relating to appeals, provides:

"An appeal may also be taken to the Supreme Court from:

"1. An order made affecting a substantial right in an action, when such order, in effect, determines the action and prevents a judgment from which an appeal might be taken;

"2. A final order made in special actions affecting a substantial right therein, or made on a summary application in an action after judgment; * * *

"4. An intermediate order involving the merits or materially affecting the final decision; * * *"

The first subdivision of Section 4101 authorizes an appeal from an order affecting a substantial right which, in effect, determines the action, but prevents a judgment from which an appeal might be taken. Subdivision 2 relates to special actions only. Subdivision 4, however, applies to orders involving the merits, or materially affecting the final decision. If an appeal may be prosecuted from the ruling complained of, authority therefor must be found in this provision of the statute. In determining this question, we are required to go no further into the merits than to determine the effect of such ruling. Was the defendant, by it, deprived of some right materially affecting the final decision of the issues? Unless such was the effect of the order, no right of appeal exists. The writer of the opinion in *Northwestern Trad. Co. v. Western L. S. Ins. Co.*, 180 Iowa 878, following the prior holding of the court in *Schoenhofen Brewing Co. v. Giffey*, 162 Iowa 204, and *State v. Des Moines City R. Co.*, 135 Iowa 694, stated the test of appealability to be:

"Whether the question is or will be inherent in the final judgment, and may be presented on appeal from that judgment. If the ruling is of such a nature and affects rights in such a manner that they cannot be protected by appeal from the final judgment, then an appeal will lie. But if the question involved will inhere in the final judgment, and can be presented in an appeal from that judgment, it will be treated as an interlocutory order, review of which can only be had upon the general appeal. We say, in *State v. Des Moines City R. Co.*, 135 Iowa 694, at 717: 'Ordinarily, every substantial right of the parties can be effectually protected by preserving a proper record, and presenting the questions thus saved, upon appeal from final judgment.'"

Counsel for plaintiff, in his written and oral arguments, claims the right to recover upon but one count of his peti-

tion. The purpose of pleading the cause of action in two counts is manifest. An appeal may be taken from a judgment upon either or both counts of the petition, if the court, in submitting the issues, should allow recovery upon both counts thereof. By preserving proper exceptions to an adverse ruling upon a motion to direct a verdict, or to the refusal of the court to give proper requested instructions, or perhaps by motion in arrest, all errors in such rulings may be reviewed upon appeal. We see no way in which the issues could be submitted to the jury so as to deprive defendant of the right and opportunity to have every prejudicial ruling reviewed upon appeal.

2. APPEAL AND ERROR: when judgment not entered on appeal.

Applying the test above stated, we must hold that no right of defendant "involving the merits or materially affecting the final decision" was lost by the order of the court overruling the motion to require plaintiff to elect and to strike, and that, if the ruling was erroneous, it may, by preserving proper exceptions to the further rulings of the court, be reviewed upon appeal from the final judgment; and hence no decision upon the merits of the motion may be had upon this appeal, unless upon the second division thereof, treated as a demurrer.

Counsel for appellant has not, in argument, treated the motion as a demurrer; but counsel for appellee contends that it is, to all intents and purposes, a demurrer, and that, as defendant has not answered, he is in default, and therefore appellee demands judgment in this court. Were we to treat the motion as a demurrer, and hold that same was properly overruled, no judgment would be entered at this time. Defendant is not in default in the court below. An order was issued by the court, staying further proceedings, pending the appeal. We hold, however, that an appeal

does not lie from the order of the court overruling defendant's motion, and same is—*Affirmed*.

WEAVER, C. J., LADD and GAYNOR, JJ., concur.

G. W. MUNN et al., Appellants, v. INDEPENDENT SCHOOL DISTRICT OF JEFFERSON et al., Appellees.

SCHOOLS AND SCHOOL DISTRICTS: Selection of Schoolhouse

- 1 **Site—Vote of Electors—Effect.** A majority vote of school electors, cast in connection with a defeated bond proposition, in favor of retaining an old schoolhouse site, and personal pledges of divers directors to abide by such vote, do not deprive the directors of their statute-given power, on a *subsequent* voting of bonds, to select a new site and employ the proceeds of the bonds thereon.

SCHOOLS AND SCHOOL DISTRICTS: Selection of Schoolhouse

- 2, 3 **Sites—Review by Court.** Selections of schoolhouse sites are non-reviewable by the courts, so long as the directors act within their statute-given powers.

APPEAL AND ERROR: Review—Nonentertainable Assignment.

- 4 An affirmance of a ruling dissolving a temporary injunction becomes the law of the case, and precludes the consideration of an assignment of error based thereon, in an appeal from the final order denying a permanent injunction.

INJUNCTION: Futile Injunction. An injunction will be denied

- 5 when the very thing sought to be prevented is an accomplished fact. So held where it was sought to prevent the building of a schoolhouse on a named site, and the building had been already built thereon.

CONSTITUTIONAL LAW: Classification and Due Process—Vari-

- 6 **tion in Condemnation of Property.** The assembly may validly provide different courses of procedure for the condemnation of private property (1) by school districts and (2) by railways. So held where the difference was in the obligation to take and pay for the land, and in the assessment of costs and attorney fees.

Appeal from Greene District Court.—M. E. HUTCHISON,
Judge.

MARCH 16, 1920.

THE Independent School District of Jefferson undertook the erection of a new high school building, and bonds were voted and issued for that purpose. A controversy arose over the location of the site for such building, and in that controversy this litigation had its origin. One faction of the citizens of the district favored the site of the old building, while others favored the selection of a new site. At the time this suit was begun, in May, 1917, the board of directors had decided in favor of a new location, and had begun proceedings to condemn for that purpose certain grounds known in the record as Block 34. Thereupon, this action was begun by several residents and taxpayers to enjoin the condemnation proceedings, and for temporary and permanent injunction restraining the district and its board of directors from locating the new building at any place other than the site of the old one, or ground immediately adjoining. A temporary injunction was issued, as prayed, but, within a few days thereafter, the court vacated and dissolved the writ, on motion of the defendants. From such order plaintiffs appealed to this court, and applied for an order staying proceedings and continuing the injunction in force, pending the disposition of said appeal. The application was denied, and the order of the district court dissolving the injunction was affirmed. The issues joined between the parties were thereafter tried to the district court, which, after a full hearing upon the merits of the case, found for the defendants, denied the prayer for an injunction, and dismissed the petition. From that decree, appeal has been taken by four of the ten plaintiffs, and it is this appeal which now calls for our consideration. The facts,

so far as they may be necessary to a decision, are stated in the opinion.—*Affirmed.*

Senneff, Bliss & Witwer, J. A. Henderson, and T. A. Muga, for appellants.

E. G. Graham, Church & McCulley, and Howard & Sayers, for appellees.

WEAVER, C. J.—It is quite impossible to state this case with anything like the fullness of detail which marks its presentation by counsel, and keep our opinion within its reasonable limit of space. The abstracts contain about 450 printed pages, and the arguments of counsel are equally voluminous. Appellants' "statement of facts" contains 366 distinct paragraphs. The assignment of error upon rulings of the trial court are 27 in number, and to these are added other alleged errors committed by this court in disposing of plaintiffs' appeal from the dissolution of the temporary injunction. All this is followed by appellees' motion to dismiss the present appeal, which fills 28 closely filled typewritten pages.

Such a record compels us to select for specific mention and discussion only those facts and legal propositions which appear to us of controlling importance and necessary to our understanding of the essential issues presented.

I. It is proper at the outset to expand the preliminary statement of facts by adding thereto the following, concerning most of which there is no dispute:

(1) At an election held on March 29, 1915, there were submitted to the voters of the Independent District of Jefferson two propositions, as follows:

(a) The first question was upon issuance of bonds of the district in the sum of \$60,000, "for the purpose of constructing and equipping a new schoolhouse."

1. SCHOOLS AND
SCHOOL DIS-
TRICTS: selec-
tion of school-
house site: vote
of electors:
effect.

(b) The ballot upon the second question was in the following form:

"☐ I favor the present site; meaning the present school grounds or ground adjacent thereto."

"☐ I favor some other site away from the present school site to be selected by the board."

This election resulted in the defeat of the bonding proposition, while a very considerable majority of the voters indicated their preference for the old site.

(2) Thereafter, on May 26, 1915, a second election was held, on the question of issuing bonds to the amount of \$70,000, "for the purpose of constructing and equipping a new schoolhouse," and the proposition was carried by a substantial majority. No vote was taken at this election upon the choice of location for the new building.

(3) Owing to some irregularity in the last-mentioned election, the bonds authorized could not be marketed, and a third election was held on May 29, 1916, at which a proposition for a bond issue of \$80,000 was submitted, and carried by a large majority. There was no attempt at this election to vote upon a choice of site for the building. It appears, however, that the subject of the location of the proposed building was a matter of much discussion, pending the call for the second election, and that four of the five members of the board signed a statement or circular for public distribution, to the effect that they felt bound by the vote at the first election, and that, if the bond issue was carried, said directors would locate the building on the site so designated. In the campaign preceding the third election, the subject of locating the site of the proposed building was, perhaps, less prominent, but was still the subject of public discussion; and, for the purposes of the appeal, it may be conceded that the directors, or some of them, repeated or renewed their expression of purpose to adhere to the choice of the old site.

It is not disputed that, at all times, all parties to the controversy conceded that, if the old site was to be retained, additional grounds bordering thereon were essential to its use for that purpose.

(4) When the bond issue was finally settled, the directors, in apparent good faith, sought to obtain title to the additional grounds deemed necessary to make the old site suitable for the location of the new building, and to that end contracted for the purchase of one tract, and began proceedings to condemn another. The situation then became complicated by litigation involving the right of the district to condemn the property last mentioned, and by the act of the owner of another desired tract in refusing to carry out his contract to convey it, thus necessitating a suit to enforce his specific performance. About this time, new public interest in the question was excited by an offer by Captain Head, a citizen of Jefferson, to convey to the Independent District a site of 5 acres of land for the schoolhouse, and to dedicate an adjacent tract of 10 acres as a park, without cost or other consideration, except the location of the schoolhouse on the 5-acre tract. This discussion materialized in a petition to the directors, signed by over 700 citizens and voters of the Independent District, constituting a decided majority of the voters, asking the board to consider the question of abandoning the old site and accepting the offer of Captain Head. A largely attended public meeting was also held, to induce the board to change the location from the old site. The board having declined to so act, and having indicated its purpose to retain the old site, certain citizens and taxpayers of the district appealed from its decision regarding the location of the new building, to the county superintendent of schools.

Trial of said appeal before the superintendent was begun; but, before its conclusion, the board of directors and the appellants in that proceeding entered into a written

2. SCHOOLS AND
SCHOOL DISTRICTS: selection of school-house sites: review by court.

ted to its discretion by the statute is reviewable only upon appeal to the county superintendent of schools, and thence to the state superintendent of public instruction; and, in the absence of some showing that the board has clearly exceeded its statutory jurisdiction and authority, the courts will not attempt to control its action, by injunction or otherwise. *James v. Gettinger*, 123 Iowa 199; *Doubet v. Board of Directors*, 135 Iowa 95; *Kinney v. Howard*, 133 Iowa 94; *Vance v. District Township*, 23 Iowa 408; *Crawford v. School Twp.*, 182 Iowa 1324. The determination of the board of directors in this case to place the new building upon Block 34 was not appealed from by the plaintiffs, or by any of them, or by any other person; and, for the reasons above stated, this action to enjoin the purchase of the site or use of the bond fund cannot be maintained by the court, unless there be alleged and shown some valid reason or ground for declaring the act of the board wholly unauthorized.

Stated as briefly as practicable, the position of the appellants is that the bonds for building the schoolhouse were voted by the district upon the express and implied pledge or promise of the directors to make use of the old site, and that the board thereby became legally and equitably bound to place the building there, and not elsewhere. Referring to this phase of the case, the trial court, in dismissing the plaintiffs' petition, stated its finding: that, while the question of voting the bonds was still before the people of the district, the members of the board did make public promise or statement of their purpose to build upon the old site, and that such was, at that time, the wish or preference of a majority of the voters. The court further stated its opinion that good faith upon part of the directors required them to make an honest and reasonable effort to locate the building on the old site, or on lands adjacent thereto, but that such

obligation did not deprive them of the power and discretion given them by law to select or adopt another site, if, upon making such honest and reasonable effort, the performance of their pledge was found impossible or impracticable. Proceeding upon such theory, the court stated its conclusion as follows:

"I believe, from the evidence in this case, that the defendant board did make such effort to carry out these pledges which had been made to the voters, and that its failure to secure such a location is due to no fault of the board, which found itself in a position where such selection could not be made and adhered to, with any reasonable prospect of success. The action of the board in selecting the site here complained of was not taken in bad faith, but was prompted by a desire to provide the school building of which the school district was greatly in need, under circumstances which seemed to make any other solution of the problem impossible."

It appears to have been taken for granted from the outset, by all concerned, that the old site, as it then existed, was inadequate for the purposes of a new and enlarged building, and that, if it were utilized for that purpose, other and additional adjacent ground would have to be procured. The record fairly shows that, when the bond proposition was finally adopted by the district, the board did proceed with an apparently diligent and earnest effort to secure the additional grounds so needed, and became involved in litigation which promised indefinite delay in securing the necessary title. In the presence of this complication, and the offer of other alleged desirable sites, it is further quite evident that public sentiment, an ever uncertain and fickle element in human affairs, veered from the choice of the old site, and found expression in a petition to the board, signed by more than three fourths of the voters of the district, asking that the choice of another site be considered. Still feel-

ing bound by their pledges, the directors adhered to the old site until their decision was appealed from, and the stipulation already mentioned, referring the dispute to the state superintendent, was entered into, with the result hereinbefore mentioned.

The district was in sore need of a schoolhouse. The old building had been condemned, as unfit for use. It was unwise, if not unlawful, to expend the money of the district in constructing a building upon grounds to which title had not yet been obtained, and there was no immediate or certain prospect of obtaining it. The board was charged with the duty, as well as the power, to provide a site for the building, a power of which it could not divest itself, and a duty to the district which it could not properly refuse to perform. Having encountered an obstacle to the use of the old site which could not be promptly and effectively removed, we agree with the trial court that the directors cannot be charged with having exceeded their statutory power, in locating the building upon other convenient grounds. That, in so doing, they succeeded in finding the best way out of the factional quarrel which had disturbed the harmony of the district, appears to be demonstrated by the cheerful acquiescence of their constituents generally in the construction of the building upon Block 34; a fact which is made apparent by the circumstance already mentioned, that, in two successive elections, held since the choice of that site, the voters have approved the issue of additional bonds to the amount of \$95,000, to carry the work to completion.

In affirming the conclusion of the trial court, we do not wish to be understood as deciding that the vote cast for the choice of site at the first election, held in 1915, at which the proposed bond issue was defeated, was of any legal force or binding effect to control the action of the directors in the matter of selecting a site after the third election in 1916, at

which the bond issue of \$80,000 was carried, without any accompanying vote upon the question of site. The original vote in 1915 and subsequent statements and pledges by the individual directors may very properly have been regarded by them as imposing a moral obligation to do what was reasonably possible to retain the old site; but we are not prepared to hold that they were thereby shorn of their authority, when acting in their official capacity, to select a suitable site for the building, according to their best judgment, honestly exercised in the public interest.

The case of *Rodgers v. Independent School Dist.*, 100 Iowa 317, on which appellants largely rely, is not controlling here. In that case, the board of directors submitted to the people the question of a proposed bond issue. Controversy had arisen between advocates of building on the old site, and others desiring a change; and the bond issue had been defeated. Another election was then called, in the notice of which the people were advised that the question would be for the issue of bonds "to build a schoolhouse on old site;" and, at the election, the ballot upon its face expressly declared that the question to be decided was on the "issuing of bonds for \$12,500, to build schoolhouse on old site," and this proposition was carried. In view of such showing, it was held by this court that the proceeds of the bonds could not lawfully be diverted to the building of a schoolhouse on another site—a decision the correctness of which may here be conceded; but the case before us presents a very different situation. The only vote taken by the electors of Jefferson on the subject of a site for the proposed schoolhouse was at the one held in March, 1915, when the building project was defeated. At the later elections, the question of site was not voted upon, nor was the use of the funds to be derived from the bond issue in any manner limited to the old site, in the call or notice or form of ballot for such elections. There were no conditions attached to

the bond issue, save such as are to be implied from the purpose for which they are authorized by statute. Indeed, it is to be said that, at the election which authorized the bond issue of \$80,000, the necessity of expending money for either a new site or an enlarged old site was expressly recognized in the form of the question prepared and submitted for the use of the voters, which reads as follows:

"Shall the Independent School District of Jefferson, in the county of Greene, state of Iowa, issue bonds not to exceed eighty thousand dollars (\$80,000.00) for the purpose of constructing and equipping a new schoolhouse *and procuring a site therefor?*"

This is not only consistent with the unrestricted exercise by the board of directors of all their statutory authority and discretion in the matter of selecting a site for the schoolhouse, but is quite inconsistent with the assertion that it had, in some unofficial manner, abdicated its authority.

III. Counsel for appellants argue at considerable length that the act of the state superintendent of public instruction, with reference to the selection of Block 34 as a site for the schoolhouse, was without authority of law.

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selection of school-
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view by court.

Under the record, we think it quite immaterial whether the superintendent had any controlling authority in the matter. The material inquiry, as already said, is whether the board of directors exceeded its jurisdiction and authority in selecting the site, or in adopting the site recommended by the superintendent. We think it unnecessary to inquire or decide whether the action of the superintendent was authorized. If his action in the premises was valid, the board did not exceed its power in acting upon it. If his action was invalid, the board's selection of the site was still within the scope of its own discretion and authority. Its decision, as we have seen, not being in excess of the power conferred

upon it, and not having been appealed from, cannot be controlled by injunction.

IV. Many assignments of error are directed against the ruling of the trial court, dissolving the temporary injunction. As the plaintiffs took their exception to that or-

4. APPEAL AND
ERROR: review:
non-entertain-
able assign-
ment.

der, and appealed therefrom, with the result that such ruling was affirmed, the question sought to be raised is no longer an open one, and the decision so made is, to that extent, the law of the case. Indeed, it is quite difficult to understand what material question said adjudication leaves in the case. The substance of the relief demanded is an injunction against the acquirement and use of Block 34 as the site of the schoolhouse, and against the appropriation of the bond fund of the district for the building of a schoolhouse elsewhere than on the old site. To that end, plaintiffs presumably made their best possible showing of alleged facts in their petition and application for a temporary injunction. In dissolving

5. INJUNCTION:
futile injunc-
tion.

such injunction, the trial court and this court necessarily held that the alleged facts, even if established by proof, were insufficient to justify equitable interference, and, by vacating the injunctions, left the district and its directors at liberty to proceed with the acquirement of the title to the new site and the construction of the building thereon, and to appropriate thereto the proceeds of the bonds; all of which, the evidence tends to show, has, in fact, been done. The essential thing against which the plaintiffs sought to use the injunctive power of the court is now an accomplished fact. The money has been expended, the schoolhouse has been constructed, and, we may presume, is now in actual occupancy and use by the district for school purposes. To grant an injunction at this time would be an idle ceremony,

as the decree and writ would have nothing upon which to operate.

V. One of the plaintiffs, Anna Mugan, claims to have owned an interest in one of the lots in Block 34 which the district undertook to condemn for the new site, and she alleges that the proceedings were void, because the statute under which the condemnation was had is unconstitutional. The statute referred to was enacted by the thirty-seventh general assembly, as a substitute for Section 2814, Code Supplement, 1913,

6. CONSTITUTIONAL LAW: classification and due process: variation in condemnation of property.

and is said to be void because it violates the constitutional guaranty of due process of law, in that, while providing for an appeal to the district court from the award of damages, it imposes no obligation upon the district to take and pay for the land, and does not provide for assessing costs and attorneys' fees against the district, as is done under the statute providing for the exercise of the right of eminent domain for works of internal improvement. The argument of counsel in support of this position is, in effect, that the distinction made by the statute between proceedings for condemnation for works of internal improvement generally, and proceedings for condemnation of schoolhouse sites, is an unreasonable and arbitrary discrimination, which contravenes the constitutional rule.

We are not persuaded that the distinction is either unnatural or arbitrary. To constitute a violation of the constitutional provisions in this respect, the unreasonable character of the discrimination must clearly appear. It is not enough that it may seem to the court unwise or unnecessary, but its arbitrary character must admit of no reasonable doubt. *Hunter v. Colfax Cons. Coal Co.*, 175 Iowa 245, 288; *McLean v. Arkansas*, 211 U. S. 539, 547; *State v. McGuire*, 183 Iowa 927.

There is a manifest distinction between the exercise

of the right of eminent domain by a school district for school purposes, solely in the public interest, and the exercise of the same power by a railway company for its right of way, or by a mill owner, to acquire the right to flood adjacent land by the erection of a mill dam, to promote an interest which is only quasi public; and if the legislature, recognizing such distinctions, provides distinctive methods of condemnation, there is no infraction of the property owner's constitutional rights. So far as appears, the plaintiff Mungan was duly notified of the condemnation proceedings, and, if there was any error or irregularity therein, she had her remedy by appeal.

It is argued that the statute here in question was enacted by the legislature at the instance or by the management of counsel for appellees, to facilitate the purpose of the district or of its board of directors in the selection of the new site for the school building. This is a question which in no manner affects the merits of the case. The enactment of the statute was clearly within the power of the general assembly, and the motives of the legislators and the reasons or arguments leading them to such action are not a matter into which we can properly inquire.

Further discussion of the case is unnecessary. For the reasons hereinbefore stated, we are satisfied that the board of directors of the defendant district did not exceed its jurisdiction and authority in fixing the site of the new schoolhouse, nor in appropriating the proceeds of the bond issue for the erection of the building on the site so fixed. The equities are with the appellees, and the decree of the district court dismissing the bill is—*Affirmed*.

EVANS, GAYNOR, PRESTON, and SALINGER, JJ., concur.

N. B. SHAFFER, Appellant, v. C. F. MORGAN, Appellee.

JUDGMENT: **Default—Non-Specific Affidavit of Merit.** Affidavits of merit, in applications to set aside defaults, should specifically recite the defensive facts. A general statement that the one in default "has a meritorious defense" is quite insufficient.

Appeal from Polk District Court.—GEORGE A. WILSON,
Judge.

MARCH 16, 1920.

APPEAL from the action of the court in setting aside a default. Opinion states the facts. Plaintiff appeals.—*Reversed.*

Brammer, Seevers & Hurlburt, for appellant.

Miller, Parker, Riley & Stewart, for appellee.

GAYNOR, J.—This is an appeal from the action of the district court of Polk County in setting aside a default and judgment entered on the 4th day of September, 1919. The original notice was duly served upon the defendant on the 11th day of July, 1919, in Polk County, notifying the defendant that, unless he appeared in the district court of Polk County on or before noon of the second day of the September term of said court, default would be entered against him, and judgment rendered thereon. The September term convened on the 2d day of September, 1919. The default and judgment were entered on the 4th day of September, 1919. The defendant did not appear until after judgment and default were entered, on the 4th day of September, 1919. On that day, he filed a motion to set aside the default and judgment, and based his right to have the default set aside on facts disclosed in two affidavits, one

by Glenn L. Tidrick, and one by the defendant himself. These affidavits are as follows:

"I, Glenn L. Tidrick, being first duly sworn, on oath depose and say that I reside in Des Moines, Iowa; am assistant secretary of the Horticultural Insurance Company, with offices in the S. & L. Building, in Des Moines, with which company C. F. Morgan is associated as chief adjuster; that Mr. Morgan is compelled to spend the major part of his time traveling about the state of Iowa; that, on Monday morning, September 1, 1919, the same being Labor Day, Mr. Morgan handed me a copy of an original notice in a suit brought against him in the district court of Polk County, Iowa, by N. B. Shaffer, and requested me to deliver said notice as *promptly as possible* to William E. Miller, of the firm of Miller, Parker, Riley & Stewart, his attorneys; that I promised Mr. Morgan to do so, and fully intended to get in touch with Mr. Miller and deliver said notice to him during that day or early in the morning of Tuesday, September 2d, but Monday, September 1st, being Labor Day and a holiday, I entirely forgot my promise to Mr. Morgan, and failed entirely, through forgetfulness and oversight, to deliver said notice to Mr. Miller at any time, and I did not think of the matter again until I next saw Mr. Morgan, which was on Monday, September 8th; that the failure to get said notice into the hands of Mr. Miller is wholly my fault, and due to oversight and forgetfulness. I know that Mr. Morgan was compelled to leave town and did leave town early in the forenoon of Labor Day, and that he did not return until late Saturday evening, September 6th. That I am not in any sense an agent for Mr. Morgan, but we are connected with the same concern, and occupy the same offices, and I undertook to attend to this errand for Mr. Morgan simply as a matter of personal accommodation. [Duly signed and verified.]"

"I, C. F. Morgan, being first duly sworn, on oath depose and say that I am the person named as defendant in a cause entitled N. B. Shaffer v. C. F. Morgan, No. 28916 law, in the district court of Polk County, Iowa, in which the plaintiff's petition was filed July 7, 1919; that, prior to the commencement of said suit, and prior to the service of the original notice therein, I consulted William E. Miller, of the firm of Miller, Parker, Riley & Stewart, attorneys at law, in reference to the matters involved in the plaintiff's claim against me, as set forth in said petition, and I arranged with Mr. Miller to defend me in the said matter, in the event suit was brought thereon, and was advised by him to send the copy of the original notice to him whenever the same was served upon me; that I have a good defense to the claim made against me by the plaintiff; that I am an adjuster for the Horticultural Insurance Company, with offices in the S. & L. Building in the city of Des Moines, and am obliged to spend the major part of my time traveling about the state of Iowa; that, at the moment when the original notice of this suit was served upon me, I was on the point of leaving the city of Des Moines, and was compelled to leave the city of Des Moines within a few minutes thereafter, and remained out of the office and out of the city almost continuously until Monday, September 1st, when I expected to deliver said original notice to Mr. Miller and confer with him; but Monday, September 1st, being Labor Day, and all offices being closed, I was unable to get in touch with Mr. Miller, although I endeavored to do so, and was compelled to leave the city of Des Moines again on the morning of Monday, September 1st. In order to look after the matter, I therefore handed the copy of the original notice to Glenn L. Tidrick, assistant secretary of the company with which I am associated, and he promised to get the said notice into the hands of Mr. Miller promptly on the morning of Tuesday, September 2d, or earlier, if he

could get in touch with him. That I was absent from the city of Des Moines until Saturday, September 6th, until about 6 o'clock P. M. I got in touch with Mr. Tidrick on Monday morning, September 8th, and then learned from him for the first time that he had failed to deliver said original notice to Mr. Miller, and had failed to have any conference with Mr. Miller in regard to this suit, and that his omission was due simply to oversight and forgetfulness. That Mr. Tidrick has no interest in this suit. [Duly signed and verified.]”

On this showing, and this showing alone, the court, on the 20th day of September, 1919, made the following order:

“Motion sustained. Defendant to file answer by September 23, 1919. (Plaintiff excepts.)”

On the 22d day of September, 1919, the defendant filed answer, the sufficiency of which to tender issue is not questioned in this case.

Plaintiff assigns two grounds for reversal:

(1) That the facts disclosed by the affidavits are wholly insufficient to justify or excuse the defendant's default.

(2) That no affidavit of merit accompanied the motion, such as is required by Section 3790 of the Code of 1897, which reads:

“Default may be set aside on such terms as to the court may seem just, among which must be that of pleading *is* suably and forthwith, *but not unless an affidavit of merits* is filed, and a reasonable excuse shown for having made such default.”

It will be noted that no answer was filed or tendered with the motion; that the answer, in fact, was not prepared or filed until long after the court had sustained the motion to set aside the default. No showing of merits was made before the default was set aside, except such as found in

the affidavit of the defendant, which appears in the following words:

"I have a good defense to the claim made against me by the plaintiff."

We may assume that the showing made excused the default. Though this is doubtful, under the holdings of this court, yet we are satisfied that the court erred in setting aside the default for the reason that the statute hereinbefore cited expressly provides that a default, regularly entered, cannot be set aside, unless there is an affidavit of merits filed. The filing of such affidavit is made, by the very terms of the statute, a condition precedent to the right to set aside a default. While it has been repeatedly held by this court that some discretion is lodged in the trial court in matters of this kind, the discretion necessary must be a legal one, and cannot rightfully be exercised in contravention of the plain provisions of the statute. In *Palmer v. Rogers*, 70 Iowa 381, the statement in the affidavit was, "I have a good and meritorious defense to the entire cause of action;" and it was said that the facts constituting the defense should have been set out, so that the court could decide for itself whether there was a defense; and it was held that the court was not justified in setting aside the default upon such showing. As supporting this holding, see, also, *Jaeger v. Evans*, 46 Iowa 188; *King v. Stewart*, 48 Iowa 334, 335; *McGrew v. Downs*, 67 Iowa 687, 688; and *Jean v. Hennessey*, 74 Iowa 348, 350. In *Polk County Sav. Bank v. Geneser*, 101 Iowa 210, 212, this court said:

"It is undoubtedly the policy of the law to dispose of cases upon their merits, and it is also true that a large discretion * * * is vested in the district courts. But the plain requirement of the statute, that an affidavit of merits be filed, to authorize the setting aside of a default,

cannot be ignored. The discretion lodged in the trial court is a legal one, to be exercised according to law."

In *Jaeger v. Evans*, supra, the court said:

"To authorize the setting aside of a default, * * * the statute requires that an affidavit of merits must be filed. * * * This provision contemplates a *showing* of merits, upon which the court may determine the sufficiency of the defense proposed to be made to the action; not an averment of the existence of merits which may be based upon the opinion or belief of the defendant. Without such showing, the court could not exercise the judicial discretion upon which rests the determination of the questions involving the defendant's right to have the default opened. The uniform practice of courts, so far as we are informed, requires, in such cases, a showing of facts whereon is based the claim of the existence of a meritorious defense."

In *King v. Stewart*, supra, the showing made was:

"Defendant has a good and substantial defense to this cause upon the merits, as deponent verily believes, from an examination of the records and facts of this case."

The court said:

"This is but the statement of an opinion by affidavit. It should be a statement of facts, that the court may determine therefrom the question of merits."

The affidavit further sets forth that the answer of the defendant was prepared, and ready to be filed when the default should be opened. The answer was tendered to the court, to be filed instanter. It was alleged that the court erred in not permitting the defendant to file his answer. The court said:

"Defendant was not entitled to answer, until it was adjudged that it was his right to have the default set aside. Then, as a condition, he must plead issuably and forthwith."

Our attention is called to *Klepfer v. City of Keokuk*, 126 Iowa 592. This does not assume to overrule the prior

cases heretofore referred to. In this case, the action was to recover damages for personal injury. The affidavit recited that an investigation into the facts had been made touching the accident, and that such investigation disclosed that the defendant was not guilty of any negligence; that the injury was due solely to the negligence of the plaintiff. This practically said to the court:

"Our defense is that we are not guilty of negligence; that the injury was due to the plaintiff's negligence."

In cases of this kind, the answer would be a general denial. The court held that the merits of the defense were sufficiently disclosed by the affidavit, and, therefore, the action of the court in setting aside the default was properly sustained.

Our attention is also called to *Reilley v. Kinkead*, 181 Iowa 615; but in that case, there was a showing of meritorious defense, and it was made at the term at which the default was entered, and, we assume, before the default was entered. No question in that case seems to be made as to the sufficiency of the showing on the merits. The record shows that the defendant appeared by counsel, moved to set aside the default, and, in the same connection, offered to pay the costs which had been made, and tendered an answer, taking issue on plaintiff's claim and setting up a counterclaim in an amount equal to or greater than the claim sued upon.

We think we are controlled by the cases hereinbefore referred to, and must say that the court was without authority in law to set aside the default under the showing made; that he exceeded the limits of judicial discretion, and his action is, therefore,—*Reversed*.

WEAVER, C. J., LADD and STEVENS, J.J., concur.

ANNA SNYDER, Appellee, v. JOHN NIXON, Administrator, Appellant.

EXECUTORS AND ADMINISTRATORS: Claims for Family Services—Overcoming Presumption.

- 1 The presumption that services rendered by a daughter to her father, in caring for him in her family, are gratuitous, is not overcome by evidence that the daughter was in indigent circumstances, while the father had financial means for his keep, even though the father was incapable of performing any reciprocal service; but a jury may find the contrary of such presumption by *additional* evidence (1) that other sons and daughters in the neighborhood were financially able to care for their father; (2) that the daughter asserted to her father and to his guardian her expectation to charge for her services, and that neither objected thereto; and (3) that the daughter then continued her services.

GUARDIAN AND WARD: Necessaries for Ward—Consent to Furnishing.

- 2 A guardian of the property and person may, without an order of court, so consent to the furnishing of *necessaries* to his ward as to bind the ward's estate for the reasonable value thereof. So held where the guardian knew that his ward was being cared for by the ward's daughter.

HUSBAND AND WIFE: Claims Arising Out of Wife's Separate Business—Care of Parent.

- 3 Services rendered by a wife in the care of her father, under an express or implied agreement that *she* will be compensated therefor, are recoverable by the wife, without any assignment by the husband to the wife.

Appeal from Dallas District Court.—GEORGE B. LYNCH, Judge.

MARCH 16, 1920.

ACTION against a deceased person, father of claimant, for services rendered. Judgment was rendered in favor of plaintiff. The administrator appeals.—*Affirmed.*

White & Clarke and *D. H. Miller*, for appellant.

E. W. Dingwell, for appellee.

GAYNOR, J.—On the 11th day of April, 1918, the plaintiff herein, Anna Snyder, filed in the district court of Dallas County her claim against the administrator of the estate

1. EXECUTORS AND
ADMINISTRATORS:
claims for family
services: over-
coming pre-
sumption.

of one Nixon, Sr., for services rendered the deceased during his lifetime. A trial was had to a jury, and a verdict returned for the claimant, and the administrator appeals.

Anna Snyder, the plaintiff, is the daughter of the deceased. The claim is for services rendered in care, board, and washing, and for money advanced and lodging furnished the deceased during a period commencing December 24, 1913, and ending January 27, 1918.

The record discloses that, for a few years prior to December, 1913, deceased was living in South Dakota, at the town of Lemmon, and owned some property there,—at least a home; that he was taken violently sick, and sent for this daughter; that, on the 24th day of December, 1913, she went to him, and removed him from a hotel, at which he was lying sick, to his home, and there aided in caring for him until about the 7th day of February, 1914. On that date, she removed him to her home in Iowa, and there cared for him, administered to his wants, and fed, clothed, and housed him, until his death, which occurred on January 27, 1918. All questions as to the character and value of the services rendered have been settled by the verdict of the jury.

The defendant presents two propositions for reversal:

• (1) That the deceased was a member of plaintiff's family at the time the services were rendered, and it is, therefore, presumed that the services were gratuitous.

(2) That no express promise to pay for the services is shown, and there is no such showing of expectation of receiving and making compensation as the law requires, to overcome the presumption that the services were gratuitous.

The general rule is that, where one renders services of value to another, with his knowledge and consent, the presumption is that the one rendering the services expects to be compensated, and that the one to whom the services are rendered intends to pay for the same; and so the law implies a promise to pay. Where, however, the family relationship exists, between the one seeking to recover and the one sought to be charged, and services are rendered one to the other within the family, the presumption is that they were rendered gratuitously. This rests upon common experience, that members of the same family, while the family relationship exists, do not usually expect to be remunerated, and do not usually expect to make remuneration for services rendered by one to the other, rendered within the family circle. The duties are reciprocal, and the services are presumed to be reciprocal. A member of a family, rendering services to another member of the same family, where the services rendered grow out of the reciprocal duties of that family relationship, and are within the scope and purpose of the family organization, cannot recover therefor, unless there is an express promise to pay for the services, or unless the showing made negatives the thought that they were gratuitous, or, that is, unless it is shown that they are rendered under such circumstances as makes it manifest that there was both an expectation of receiving remuneration and an intention of paying for the services. This doctrine last stated was laid down in *Scully v. Scully*, 28 Iowa 548, and has been followed ever since. The rule generally stated is that, where one renders services for another which are known to and accepted by the other, the law implies a promise on his part to pay therefor; but, where the party served is a member of the family of the person serving, a presumption arises that such services are gratuitous. This presumption only arises when the family relationship is shown. We might add to that that it only arises when it is shown that

the services were such as members of the family usually and ordinarily render to each other, because of and growing out of the family relationship. A family has been defined as follows:

"A collection or collective body of persons, not necessarily related, but living under one roof, and under one head or management."

The relationship is not always controlling, though it is a large factor in determining the intent of the parties. The intent to pay may be inferred from facts tending to negative the presumption that they were rendered and accepted as a gratuity. In the instant case, the plaintiff was a poor woman, living with her husband and children, in a state distant from the home of the deceased. Her husband was a laboring man, with but a small income. Deceased was taken sick in Dakota, and sent for this daughter. She came to him in Dakota, took and nursed him through his sickness there, brought him to her home, and nursed and cared for him until his death. During all this time, deceased was feeble in mind and body. Soon after his return, he was placed under guardianship. He was a man of means; while plaintiff had no means of sustaining him, except through the aid of her husband, who was a janitor in a small school in the little town in which he lived. It does not appear that deceased did any work, or that any work was exacted of him. There were no reciprocal services exacted or rendered, nor was he capable of rendering reciprocal services, in even the slightest degree, during the time he remained with the plaintiff. These facts may not be sufficient in themselves to overcome the presumption (see *In re Estate of Squire*, 168 Iowa 597), yet they have probative force, and are entitled to be considered by the jury in determining the ultimate question as to whether or not there was an intention on his part to compensate for the services rendered, and they have some probative force in nega-

tiving the thought that the services were rendered with no intention on his part to compensate his daughter therefor. See *In re Estate of Bishop*, 130 Iowa 250, and cases therein cited.

While it is true, as an abstract proposition, that, when it is shown that a person receiving the services is a member of the family which renders the services, and receives support therein, either as a child, a relative, or a visitor, a presumption arises that such services are gratuitous, still it does not follow, necessarily, that one who, though sustaining the relationship from which otherwise the presumption might arise, comes into the *family* of a child in indigent circumstances, at his own request, receives support, and renders no services, because he is at all times wholly incapable of rendering reciprocal services, and who is capable of maintaining himself and supplying his wants, enters the family with no intention to make compensation.

There is no dispute in this record that this claimant always intended to, and, in the presence of deceased and his guardian and others, said, that she expected to be remunerated for the services to be rendered. While we say that the presumption is that the services were gratuitous, when the family relationship is shown, and while we must concede that the mere fact that the father was incapable of rendering reciprocal services does not make substantive proof that he intended to pay for the services rendered him, yet, when considered in connection with all the facts, and the further fact that he had several other children, financially able to aid in his care, residing in the same neighborhood, and when we consider that the old man had means with which to provide himself with a home and care, and when we consider that this complainant was a married woman, residing with her husband, and having a family of her own, and in indigent circumstances, and, under the circumstances, under no legal obligation to support him, her hus-

band but a laboring man, with little to supply even the needs of his own family, and when we find plaintiff declaring, in the presence of the deceased and his guardian, that she intended to charge and receive compensation for the services rendered her father, and when we find that neither he nor the guardian made any objection to the rendering of the services thereafter, and with knowledge of her intent and purpose, but rather concurred in her demand (though not to the extent of her demand), and when we find the father, who, if we take the testimony of defendant's witnesses, was perfectly capable of understanding his relationship to the subject-matter of the controversy, and the extent to which he was involved, making no objection to her statements, but remaining thereafter with her, and receiving the care from her which he did receive, we think that a case was made for the jury, sufficiently strong, under the rules, to negative the presumption that the services were accepted by him as a gratuity, and to establish, as an affirmative fact, that it was in the mind of the deceased, at the time he was receiving the services, that, at some time, he would make compensation therefor. We think the whole record is pregnant with suggestion—assuming, of course, that the old man had the degree of intelligence which the defendant's witnesses ascribe to him—that he intended at all times to pay, and, by accepting the services after hearing the declaration of his daughter, touching her intent to charge and receive payment out of his estate, so that she might have compensation for the services rendered, impliedly agreed to pay. There is no question of the plaintiff's intent to charge. If this case should fail at all, it must be upon a failure to show that there was an intent on the part of the deceased to make compensation; and in this we think it has not failed. It is only a presumption that the services are rendered gratuitously, when rendered by one member of a family to another, but not a conclusive presump-

tion. It is a presumption that may be negated, as well by circumstantial evidence as by direct; and, when this presumption is negated, the general rule applies: to wit, that, where one renders services to another, with his knowledge, the law implies a promise to pay. See *Feltes v. Tobin*, 187 Iowa 11, and cases therein cited; also, *Heffron v. Brown*, 155 Ill. 322 (40 N. E. 583).

Some question is made as to the instructions of the court, in that the court said to the jury:

"If you fail to find from the evidence that there was an implied contract between the claimant and William Nixon, deceased, or his guardian, under which said services, care, and board were furnished to the said Nixon, you should find for the defendant."

2. GUARDIAN AND
WARD: necessities
for ward:
consent to fur-
nishing.

And again, in another instruction the court said that it would be necessary for the claimant to show, by a preponderance of the evidence, that there was an intention upon the part of the claimant to charge for the services, and it must also be shown that there was an intention upon the part of the deceased, or upon the part of his guardian, to pay for the services, care, and board, before the plaintiff would be entitled to recover. It is claimed that the inference from these instructions is that, if it were shown that the guardian knew these services were being rendered to his ward, and intended that she should be compensated from the estate of which he was guardian, it would be sufficient to negative the presumption that they were rendered and accepted as a gratuity. Now, the general rule is that, when necessities are supplied to a person who, by reason of his disability, cannot himself make a contract, the law implies an obligation on the part of such person to pay for such necessities out of his own property. Every person, whether of sound or unsound mind, can be made liable under an implied contract, for necessities suit-

able to his state and condition of life. See *In re Estate of Squire*, supra.

The record does not affirmatively show whether this guardian referred to in the record was a guardian of the person or of the property of the deceased. We assume, however, that he was the guardian of both; for, in his report, he says to the court: "My ward is now being cared for by his daughter, Anna Snyder, in the town of Granger, Iowa." This report was made on March 11, 1915. It was the duty of the guardian—assuming that he was guardian of the property and person of the deceased—to see that the old man was provided with the necessities of life. He knew that another was providing these things, which, under the law, he was bound to provide. While he could not make a bargain binding the estate as to the extent of its liabilities for the necessities furnished, he could consent to the supplying of the necessities, and to the payment of reasonable compensation therefor, even without the order of the court. This right and this duty inhered in the very appointment of the defendant as guardian. Assume, for the purposes of argument, that the guardian had placed this old man in the hands of this girl for care. Assume that, when he placed him there, he knew that she intended to charge for the services which she rendered. He represented the old man, and had authority, under the law, to act for him. From this very act might be inferred an intention to pay for the services, and this very act might negative the thought that the services were to be rendered gratuitously. The guardian reported to the court the very fact, and made known to the court the fact that this daughter, who is now claiming for services, was rendering the very services for which she now seeks to recover. With knowledge of the fact that she was intending to charge, he permitted him to remain there. She is asking compensation only for those things which are necessary to the old man's comfort and

well-being, supplied with the knowledge and consent of the guardian. It is doing no violence to reason or the rule to say that there was an intent on the part of this guardian that the estate of which he was guardian should be bound for the services rendered. A different rule might obtain if these were not necessities, but the estate of all men, sane or insane, whether capable of making a contract or not, is bound for necessities furnished. This is the rule in the case of minors, as well as adults.

It appears that, after the trial had been begun, the thought entered the mind of counsel that the plaintiff, being a married woman could not recover for the services rendered in the household. Thereupon, an

3. HUSBAND AND
WIFE: claims
arising out of
wife's separate
business: care
of parent.

amendment was filed, showing an assignment from the husband of all his rights in the claim urged against the estate. It is thought that she, as assignee, could not re-

cover on this claim, without showing that it was the intention of her husband to charge for the services rendered. We think, however, that, where the services were rendered by the wife, with the knowledge and consent of the husband, with a purpose on her part to receive compensation, and that purpose was communicated to the deceased and his guardian, and she is claiming for the services rendered, she may recover without an assignment. There is no evidence, except inferentially, that the husband did or furnished any of the things for which suit was brought. The services rendered were her own, and they were not such services as she owed to her husband, or such services as her husband had a right, as such, to exact from her. We think this is governed by what was said in *Tucker v. Anderson*, 172 Iowa 277.

On the whole record, we find no ground for reversal, and the judgment is, therefore,—*Affirmed*.

WEAVER, C. J., LADD and STEVENS, JJ., concur.

HERMAN TAMINGO, Appellant, v. LENA FREIBERG et al., Appellees.

TRUSTS: Consideration Paid by Non-Title Holder. One who holds
1 the legal title to land which has been paid for by another, holds
2 as trustee of the latter, no gift being intended.

EVIDENCE: Allowable Conclusion. Whether one received any-
2 thing for a conveyance is an allowable conclusion.

FRAUDS, STATUTE OF: Paying Purchase Price and Taking Pos-
3 session. An agreement under which one pays the purchase price
of land and takes possession is not within the statute of frauds.

Appeal from Floyd District Court.—C. H. KELLEY, Judge.

MARCH 16, 1920.

SUIT in partition of several lots in Charles City. The defendant Lena Freiberg put in issue the title to Lot No. 3 in Block No. 87 of Kelly & Company's Addition to that city, and, on hearing, she was found owner thereof, and decree entered accordingly. Plaintiff appeals.—*Affirmed.*

H. L. Lockwood, for appellant.

H. J. Fitzgerald, for appellees.

LADD, J.—Henry Hinken died about March 5, 1917, without spouse or issue. Title to Lots 6 and 7 in Block 88, and Lot 3 in Block 87, in Kelly & Company's Addition to St.

Charles, now a part of Charles City, stood
1. **TRUSTS:** con- in his name. Plaintiff is the only son of the
sideration paid by non-title holder. sister of deceased, who had previously de-
parted this life, as had her husband. Among

the defendants are Henry Hinken, Jr., and Lena Freiberg, children of deceased's brother, John Hinken, whose wife died when Henry and Lena were four and five years of age. The suit is for the partition of the lots. Lena Freiberg, in her answer, asserted ownership of Lot 3, of Block 87, and

bases her claim on the following facts: Her grandfather, Yelshe H. Hinken, upon his death, left a will, which was duly admitted to probate, and in which he devised to his son John Hinken "a life estate in the following described real estate, situated in Floyd County, Iowa, to wit: The northeast quarter of the southeast quarter of Section No. fourteen (14), Township No. ninety-four (94), Range No. sixteen (16), West of 5th Principal Meridian, to have the use and occupancy of the same only during his life, with the remainder after his death to his two children, whose names are as follows: Henry Hinken aged sixteen years and Lena Hinken aged fifteen years."

When Lena was about four years of age, her mother died, and thereafter she and Henry lived with their uncle, Henry Hinken, until she was married. In 1905, decedent arranged to sell to Joseph and Lewis Hecht the land devised to Lena and Henry, together with another 40 acres, owned by himself, and, on the 27th day of May, 1905, Lena and her husband executed a conveyance to said Joseph and Lewis Hecht. The defendant Lena Freiberg pleaded that, as consideration therefor, her Uncle Henry promised to and did purchase her a home in Charles City, being Lot 3 in Block 87 aforesaid. It is undisputed that the decedent did, on the 17th day of November, 1905, purchase said lot of one Barber and wife, for a consideration of \$1,000; that she, with her family, took possession, shortly after such purchase, and has continued in possession ever since. We think the evidence quite satisfactorily establishes the agreement set up by Mrs. Freiberg and its complete performance. Joseph Hecht testified that he purchased the land of decedent; that the price was \$60 per acre, or \$1,200 for one half of the 40; that, when at Burr's office, signing the deed, decedent remarked that "he would make this right with Lena, and buy her a home," and further, that Burr asked Lena, "What are you getting out of this?" to which she made no response,

away, that Albert Freiberg might mortgage it or use it. He said he would keep the legal title as long as he lived; that he wanted to keep it; and, after he would leave them, it would be hers." According to Smith, he said, pointing out the place, "I bought that for Lena." According to Schuchnecht, a week or two before his death, in speaking of his houses, he remarked, "That other place is not mine; that belongs to Lena Freiberg." On the other hand, it was made to appear that decedent paid taxes and kept up the insurance on the house, and had repairs and improvements made. The evidence that she cared for his home and did his washing is undisputed. She had been reared by him from childhood, and what he did may well be attributed to his interest in a dutiful niece, with a large family, not overburdened with the things of this world. He may have said to the insurance agent, as sworn by the latter, that he never received any rent from Mrs. Freiberg; for she says the same. The testimony of Kirsch, however, is entirely inconsistent with that of other witnesses. He related that, three or four weeks before his death, decedent informed him that "he was going to sell everything and go to Europe, if the war was over," and declared the house where Mrs. Freiberg lived belonged to him; that he ought to have sold it long ago; that "the Freibergs never paid any rent, except one year that he paid \$60, but since then, he never paid anything," and did not mention that the place belonged to Lena; that "the reason he didn't collect the balance of the rent was that they were so poor, he didn't get anything * * * had to pay a good deal of expenses and taxes and everything at the same time;" that Lena had done washing for him, but he had paid her for it. The plaintiff claimed that Mrs. Freiberg had told him, in substance, that decedent's wife collected rent until her death,—about two months,—and related that he found decedent in his house nearly frozen, shortly before his death. Without discussing the credibility of these wit-

nesses, it is enough to say that the evidence overwhelmingly establishes the agreement as alleged by Mrs. Freiberg; that, in pursuance thereof, she and her husband executed the conveyance to the Hechts, and decedent purchased the property in controversy for her, and put her in possession thereof; and that she so continued for twelve years before this suit was begun. Having paid the purchase price, and taken possession in pursuance of the agreement, the statute of frauds furnished no obstacle to the proof. Sections 4625,

4626, of the Code; *Hughes v. Lindsey*, 31 Iowa 329; *Tuttle v. Becker*, 48 Iowa 486; *Kitchen v. Chantland*, 130 Iowa 618. Nor is it perceived on what theory it may be said that decedent held the legal title,

otherwise than as trustee for the use of Mrs. Freiberg. She paid the entire purchase price in advance, and, on that consideration, he gave her possession, but took title in his own name. Authorities are numerous holding that, in such a situation, a resulting trust arises in favor of the person paying the purchase price. *Culp v. Price*, 107 Iowa 133; *Copper v. Iowa Tr. & Sav. Bank*, 149 Iowa 336, 337. See *In re Estate of Mahin*, 161 Iowa 459. The decisions cited by appellant are not in point. The trust created was by operation of law, and not under Section 4625 of the Code. Nor is the question of tracing funds involved; for it clearly appears that, in consideration of the conveyance of Mrs. Freiberg's interest in the 40 acres of land, the decedent undertook to and did purchase the property in controversy for her, and, in fulfillment of his promise, gave her possession thereof. She continued in such possession under claim of right, and might have established her title or ownership by adverse possession, had she so pleaded. It is enough, however, that she received the realty in consideration of the conveyance alluded to, and decedent held the naked title in trust for her benefit. The decree is—*Affirmed.*

WEAVER, C. J., GAYNOR and STEVENS, JJ., concur.

GEORGE W. UNDERWOOD, Appellee, v. HENRY LEICHTMAN
et al., Appellants.

APPEAL AND ERROR: Review—Numerous-Pointed Motion for

- 1 **New Trial.** Sustaining, generally, a numerous-pointed motion for a new trial raises the presumption that the court passed favorably on all the grounds, though some of the grounds are and some are not specifically referred to in the ruling.

NEW TRIAL: Non-Trial Judge—Measure of Discretion. The discretion of a non-trial judge in passing on a motion for new trial is measured *solely by the record before him.*

BILLS AND NOTES: Holder in Due Course—Rescission—Effect

- 3 The maker and payee of a negotiable promissory note may not, as against a holder in due course, rescind the transaction out of which the note arose; and instructions which authorize the jury to find a rescission, *without defining the consequences of such finding,* are prejudicially erroneous.

BILLS AND NOTES: Holdership in Due Course—Jury Question.

- 4 The issue of holdership in due course is carried to the jury by evidence that the purchaser (1) did not ordinarily buy commercial paper, (2) made no inquiry about the note when he bought it, (3) inquired, before purchase, of his attorney as to possible defenses, (4) bought the note for one third its face, and "without recourse," and (5) acknowledged, at the time, that the purchase was "risky."

Appeal from Chickasaw District Court.—A. N. HOBSON and
C. N. HOUCK, Judges.

MARCH 16, 1920.

ACTION on promissory note. The issues of fraud in its inception, and bad faith on the part of the plaintiff in acquiring it, were raised by the pleadings. The jury returned a verdict for defendants, which, on motion for new trial, was set aside, and another trial ordered. The defendants appeal.—*Affirmed.*

R. Feyerabend and M. F. Condon, for appellants.

M. E. Geiser, for appellee.

LADD, J.—In January, 1916, the defendants left Chickasaw County, to examine lands near San Benito, Texas, advertised for sale by the Santa Clara Plantations Company. After reaching Kansas City, Missouri, they were accompanied by E. F. Hall, president of that company, and by him shown the country from an automobile. According to their account, they were, figuratively speaking, taken up into a high mountain, and shown possibilities beyond the dreams of avarice,—soil impossible to exhaust, producing as much as five crops a year, yielding, when seeded to alfalfa, ten cuttings per annum, of a ton each, and worth \$17.50 a ton, an average of \$500 to \$900 worth of cotton per annum; and other like representations. They entered into a contract with the company for the purchase of 40 acres of land at \$200 per acre, and, as earnest money, executed their promissory note of \$3,200, dated January 1, 1916, payable April 1, 1917, bearing interest at the rate of 6 per cent per annum. The remainder of the purchase price was to be paid in nine equal annual installments, evidenced by notes, and secured by vendor's lien in the deed, which was to be executed on payment of the note first mentioned. The company sold the note of \$3,200 and a farm of 50 acres, near New Hampton, subject to a mortgage of \$3,000, to plaintiff for \$6,000, December 29, 1916, and, in this action, the latter prays judgment against defendants for the amount of this note. In a substituted answer, the makers allege that the note, as well as the contract for the purchase price of the Texas land, was procured by fraud practiced upon them by Hall and Wilkins, as officers of the company, in knowingly misrepresenting the land, as above indicated, and in other respects; that the representations were false, but were relied upon by defendants in making the purchase. Rescission by mutual

consent also was pleaded. The allegations of the answer were put in issue by the reply, which alleged that the note was purchased from the payee therein named, before maturity, for valuable consideration, and without notice of any infirmities therein or defect of title, and that, in so obtaining same, plaintiff acted in good faith; and that defendants are estopped from claiming a rescission of the contract, or from interposing the defense set up in the answer. After all the evidence had been introduced, and the counsel for plaintiff had made his opening argument, and the arguments of counsel for defense had been concluded, defendants filed an amendment to their substituted answer, alleging that "there was a total or partial failure of consideration for said note, sued on in this action." Motion to strike this was overruled; and, after the closing argument, the cause was submitted to the jury. Verdict was returned for defendants. Some days later, a motion containing 12 grounds, to which 2 were added by way of amendment, was filed. This happened at the March, 1918, term. Shortly afterwards, the presiding judge, Hon. A. N. Hobson, departed this life, and the motion was not ruled on until the following October, when the court, his successor, Hon. C. N. Houck presiding, sustained the motion, by setting aside the verdict and ordering a new trial. The appeal is from this ruling.

I. The opinion of his honor was filed, disclosing that he regarded the sixteenth instruction as erroneous, and that, in his opinion, the evidence conclusively proved that plaintiff had acquired the note in controversy for

1. **APPEAL AND
ERROR : review :
numerous-
pointed motion
for new trial.**

a valuable consideration, without notice, and in good faith; but this opinion did not refer to the other grounds of the motion.

The motion was sustained generally, and, for this reason, the court must be assumed to have passed on each of the 14 grounds assigned, though without indicating his reasons for

sustaining any except those mentioned. *Thomas v. Illinois Cent. R. Co.*, 169 Iowa 337; *McDonald v. Mutual Life Ins. Co.*, 178 Iowa 863.

II. The circumstance that a judge, other than the one presiding at the trial, passed on the motion for a new trial, does not warrant a modification of the rule according the trial court a large discretion in determining whether another trial should be granted. It does limit the scope of inquiry, however, to the record before him. He may not take into consideration the happenings during the trial not made of record, the appearance and conduct of the witnesses, and the like, including what is known as the atmosphere of the court room. On the other hand, a broader discretion is accorded the trial court than may be exercised by a mere reviewing tribunal court. As said in *Hughley v. City of Wabasha*, 69 Minn. 245 (72 N. W. 78):

2. **NEW TRIAL:**
non-trial judge:
measure of
discretion. "Where a motion for a new trial is made before a *nisi prius* judge, in a cause which has been tried before another judge, or before a referee, he [the judge presiding] has the right, and it is his duty, to exercise the same discretion in determining whether the motion should be granted as if the cause had been tried before himself, with the proviso or qualification, however, that such discretion must be exercised entirely with reference to the evidence disclosed by the record, as he can know nothing else as to what occurred or appeared on the trial."

See, also, *Reynolds v. Reynolds*, 44 Minn. 132 (46 N. W. 236). The court's discretion, then, must be measured solely by the record before us.

III. Defendants alleged a mutual rescission, and the evidence tended to show that, early in March, 1917, Wilkins informed defendants that the company would not perform

3. **BILLS AND
NOTES:** holder
in due course:
rescission:
effect.

its part of the contract, and that, later in the month, defendants informed the company that they would not perform. With reference to this evidence, the court instructed the jury (sixteenth paragraph of the charge) that:

"You are instructed that, if you believe from a preponderance of the evidence that the note and contract for purchase of land in controversy herein were procured by fraud, and that, in the month of March, 1917, O. L. Wilkins, president of the company, informed defendants that said company did not intend to perform its part of the contract, and that afterwards, in the same month, defendants informed said company that they would not pay said note, nor perform its contract with said company, this would constitute a rescission of the contract, and if you do not find such facts so established, then you should not find such rescission."

The jury was not advised what bearing its finding would have on the liability of defendants. As plaintiff purchased the note more than two months previous to any talk of non-performance of the contract, there seems to have been no good reason for injecting this issue into the case. Section 3060-a26 of the Code Supplement, 1913, provides that:

"Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time."

The instruction, however, opened the door for a finding by the jury that the contract had been rescinded by mutual consent, and for the deduction therefrom that the consideration for the giving of the note had failed. Such failure of consideration was pleaded by defendants in an amendment immediately preceding the closing argument, and, in overruling a motion of counsel for plaintiff to strike, the court observed that:

"The proposed amendment is in the nature of meeting

the proof already in the case, and makes the pleadings conform, in a measure at least, to the proof already adduced."

The only evidence bearing on the issue raised by the amendment was that tending to prove mutual rescission, and there is no escape from the conclusion that the instruction, given without defining the consequence of a finding thereon, constituted error, and that such instruction may have been extremely prejudicial, as the jury could have found there was a rescission, and hence, failure of consideration, and based thereon their verdict for defendants.

IV. We are not ready, however, to agree with the trial court's conclusion that the evidence conclusively established the plaintiff's good faith in obtaining the note. The evidence was ample to carry to the jury the

4. **BILLS AND
NOTES:** holder-
ship in due
course: jury
question.

issue as to the perpetration of fraud by the payee in obtaining the note, and that body might have found the Santa Clara Plantations Company's title defective, within the meaning of Section 3060-a55, Code Supplement, 1913. If the jury so found, then the burden was on plaintiff to prove that he, or some person under whom he claimed, acquired title for value and without notice and in good faith.

"To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." Section 3060-a56, Code Supplement, 1913.

Here, the evidence tended to show that the plaintiff was "a real estate man and investor;" that, as a rule, he did "not buy commercial paper;" that he knew, "about two or three weeks or a month before he bought the note, that they had it,—it might have been two months;" that he did not know of the existence of the company named as payee, at that

time, nor that Wilkins, who endorsed the note as vice-president, was such officer; that he had counted Leichtman a good friend for many years, though the payee in the note was a stranger; that he made no inquiry of him concerning the note, even though both lived in the same place, and was aware that he had dealt in Texas land; that, before dealing, he took the advice of his attorney as to whether any defense could be interposed to the note; also, that he had his attorney investigate Leichtman's financial condition, and ascertained that he owned 600 acres of land, on which there was an incumbrance of \$51,000. According to plaintiff's testimony, this land was worth \$30,000 above the incumbrances; but the evidence was such that the jury might have found its value to have been \$45,000 in excess of the mortgages thereon. The jury also might have found that the 50 acres of land which he received were worth \$100 an acre, the price for which he sold it, early in 1917. This indicated the purchase price of the note, about two months before maturity, to have been \$1,000, or a little over 30 cents on the dollar. Reineke, purchaser of the farm, testified that, in negotiating the deal, plaintiff remarked: "You would not have bought that, such risky papers as I did, paying that price for it,—a big amount;" and that "it was quite a risk to run and you would not have done it." The plaintiff admitted this testimony to be substantially correct, and explained that he had had reference to the extent of Leichtman's indebtedness, and did not refer to the inception of the notes. The jury might also have found that defendant had acted as agent of the company, and that plaintiff knew this. The note must have been endorsed prior to March, 1916, as Wilkins became president of the company at that time. Plaintiff says that the note was endorsed by Wilkins as vice-president, when first presented to him, and not until in the evening at the hotel when the transfers were made was "without recourse" written above

the endorsement. In view of these circumstances, it need hardly be added that it was for the jury to say whether it would accept or reject plaintiff's testimony that he obtained the note in good faith, and without notice. The burden was on him to show that he acted in good faith, and not on the defendants to establish his bad faith. We have, then, this situation: A person not in the business of buying commercial paper, knowing that the same has been for sale, several weeks at least, and that the maker is possessed of property amply sufficient to pay the same, purchasing the note at less than one third of its face value, but so doing after inquiring of his attorney whether any defense might be interposed, and with knowledge that the note purchased was being sold by one who had employed the maker as his agent, and that the seller, at the last moment, had endorsed it "without recourse," and making the subsequent statement to a third person that the purchase of the note "was quite a risk to run." Surely, such a state of facts, if found, would cast suspicion on the plaintiff's testimony that he acted in good faith, and might have led to the conclusion that he knew of the infirmity alleged, or, if he did not know, that his omission to make inquiry arose from a belief or suspicion that inquiry would disclose such infirmity in the instrument as would defeat recovery thereon. See *Lundean v. Hamilton*, 184 Iowa 907. It may be that we have omitted some of the extenuating circumstances. Our aim has been merely to set out enough to demonstrate that this issue was for the jury. The court granted a new trial because of the error in the sixteenth instruction, and its order in so doing is—*Affirmed*.

WEAVER, C. J., GAYNOR and STEVENS, JJ., concur.

LOUIS ANTHONY, Appellee, v. MATT O'BRIEN, Appellant.

APPEAL AND ERROR: Waiver—Failure to Repeat Motion for Directed Verdict. Error in overruling, at the close of plaintiff's evidence, a motion for directed verdict, is waived by not repeating the motion at the close of *all* the evidence.

TRIAL: Instructions—General Objections Disregarded. Objections to instructions will be disregarded, unless they specify the part of the instruction objected to and the *grounds* of the objection. (37 G. A., Ch. 24.)

TRIAL: Instructions—Waiving Objections. Objections to instructions are waived by failure to submit them to the court and secure ruling thereon. (37 G. A., Ch. 24.)

TRIAL: Instructions—Refusal—Assignment of Grounds—Sufficiency. A party may not rely on the mere refusal to give an instruction. He must go further, and *specify the grounds* on which he predicates error in such refusal. (37 G. A., Ch. 24.)

Appeal from Fremont District Court.—J. B. ROCKAFELLOW, Judge.

JANUARY 20, 1920.

REHEARING DENIED MARCH 17, 1920.

ACTION on an alleged breach of contract in the sale of corn resulted in a verdict for plaintiff and judgment thereon. The defendant appeals.—*Affirmed.*

Tinley, Mitchell, Pryor & Ross, for appellant.

Ferguson, Barnes & Ferguson, for appellee.

LADD, J.—I. Plaintiff and defendant entered into an agreement, December 29, 1916, in words following:

"I have this day sold to Lewis Anthony 8,000 to 10,000 bushels of good sound dry, No. 4 or better corn, white, at the price of 83c per bushel, f. o. b. Payne Jct., to be delivered at elevator at Payne Jct., as soon as cars are furnished.

"(Grain that is not up to the grade-purchased, to be accepted at market difference).

"I hereby acknowledge receipt of \$. . . . to apply in payment of above contract, and certify that the grain thus sold is now in my possession and is free and clear of all incumbrances and liens.

"[Signed] Matt O'Brien, Seller.

"Lewis Anthony, Buyer."

Plaintiff alleged that cars were furnished at Payne Junction for the receipt of said grain at several times, and that defendant was notified thereof, but at all times refused to deliver the corn, and has, in every respect, breached the contract; and prayed for damages in the difference between the contract price and the market price at the time of such refusal. The defendant interposed a general denial. At the close of the evidence, the defendant

1. **APPEAL AND ERROR:** waiver: failure to repeat motion for directed verdict.

moved that a verdict be directed for the defendant. This motion was overruled, and the defendant proceeded to introduce evidence in his own behalf, and thereafter, witnesses were called in rebuttal by plaintiff.

The error first assigned is that "the court erred in not sustaining the defendant's motion for a directed verdict in his behalf at the close of the plaintiff's evidence," citing the page and line where it might be found. This was repeated at the beginning of the argument, and, though not mentioned, the brief point was broad enough to include the same. It will be noted that the sufficiency of the evidence in its entirety later was not challenged in this motion; nor is any error in ruling thereon assigned. It is well established in this state that a defendant, by introducing evidence after such a ruling, waives the error, if any, in denying the motion. *Stoner-McCray System v. Manhattan Oil Co.*, 176 Iowa 630. The error, if any, having been waived, may not be reviewed.

II. The fourth error assigned is to the giving of Instruction No. 7, and the fifth, "in submitting to the jury matters about which there was no dispute." The written objections to the instructions were general, and did not refer specifically to any particular instruction or portion thereof. The motion for new trial was equally general; neither the motion nor the exceptions complied with the requirements of Section 1 of Chapter 24, Acts of the Thirty-seventh General Assembly, providing that:

"Either party may take and file exceptions to the instructions of the court or any part of the instructions given or to the refusal to give any instruction as requested within five days after the verdict in the cause is filed or within such further time as the court may allow and may include the same or any part thereof in a motion for a new trial, but all such exceptions shall specify the part of the instructions as excepted to, or of the instructions asked and refused and objected to, and the grounds of such objections."

In not directing attention to the portion of the instruction claimed to have been erroneous, the exceptions were insufficient. Even though the objections had been sufficient, however, they were never submitted to and passed on by the court, and for this reason may not be reviewed. *Gibson v. Adams Express Co.*, 187 Iowa 1259.

III. The second assignment of error was the refusal to give the first instruction requested, and the third error assigned was as to the refusal to give the second instruction requested. Neither in the objections or exceptions, nor in the motion for new trial, are the above refused instructions referred to, nor objections to the refusal to give them mentioned in connection with such instruc-

2. TRIAL: instructions: general objections disregarded.

3. TRIAL: instructions: waiving objections.

4. TRIAL: instructions: refusal: assignment of grounds: sufficiency.

tions or such refusal. - The defendant contents himself with pointing out generally what the court should have instructed, instead of what it did instruct. It will be observed, from the latter portion of the statute above quoted, that the objections or exceptions are not to instructions refused, but "to the refusal to give any instructions as requested." The exceptions must specify the part "of the instructions asked and refused and objected to and the grounds of such objections."

The latter portion of the statute is awkwardly worded; but the very evident purpose thereof, when considered in connection with the context, is that a party may not rely on a mere refusal to give an instruction, but must specify the grounds on which he predicates error in such refusal. There is quite as much reason for requiring this as in exacting specific objection to the instructions, and both are calculated to facilitate corrections of errors in the *nisi prius* court, and thereby avoid the expense and delay of appellate reviews, as far as possible. Whether an instruction requested, or some feature of it, should be submitted to the jury, often involves a careful comparison between the instructions requested and those given. Moreover, many instructions are requested so near the time of submission to the jury as to render unlikely a careful examination and critical comparison of those given and those requested, and it is only fair that the trial court have an opportunity to have all the alleged defects in instructions given and in the refusal to give, submitted and passed upon, as a condition precedent to review in this court. Such was the view expressed in *Gibson v. Adams Express Co.*, supra. Because of not specifying the grounds of excepting to the refusal to give the instructions mentioned, and the fact that the court did not pass thereon, we may not review the rulings refusing to give the instructions mentioned.—*Affirmed.*

WEAVER, C. J., GAYNOR and STEVENS, JJ., concur.

C. P. HALVER, Appellee, v. HIGGINS SHEEP COMMISSION COMPANY et al., Appellants.

REFORMATION OF INSTRUMENTS: Belated Claim of Mistake.

- 1 One who, without complaint, accepts delivery of property under a written contract as then written, with full knowledge that such contract does not contain a certain guaranty, may not, when called on for payment, ask for a reformation of the contract, on the plea that said guaranty was inadvertently omitted from the contract, and especially when his failure to pay for the property at the time of acceptance, as provided in the contract, was an act of bad faith. Evidence reviewed *in extenso*, and held insufficient to justify reformation for mistake.

WEAVER, C. J., dissents as to the facts shown by the record.

APPEAL AND ERROR: Review, Scope of—Belated and Inconsistent Theory on Appeal.

- 2 One may not plead and try his case on the theory that an agent had authority to enter into a certain contract, and, on appeal, question such authority.

Appeal from Woodbury District Court.—GEORGE JEPSON, Judge.

MARCH 17, 1920.

ACTION on a written contract, to recover the agreed purchase price of certain lambs delivered by the plaintiff to the defendant, pursuant to such contract. The answer of the defendant admitted the execution of the contract, but averred that the contract itself did not express the real agreement of the parties, in that the same should have contained an undertaking and guaranty on the part of the plaintiff of the weights of the lambs to be delivered, and that such provision was omitted by oversight, and that the same should now be reformed. Defendant avers a breach of the terms of the contract, as thus reformed. It prays a reformation and a judgment on counterclaim or cross-bill. The cause was tried in equity. The district court entered

a decree for the plaintiff, substantially as prayed, and dismissed the cross-bill. The defendant has appealed.—*Affirmed.*

E. A. Burgess and Fred H. Free, for appellants.

Henderson, Fribourg & Hatfield, for appellee.

EVANS, J.—I. The defendant Joshua W. Higgins operates under the trade name of Higgins Sheep Commission Company, and is engaged in the business indicated by such trade name, in Sioux City. The plaintiff

1. REFORMATION
OF INSTRU-
MENTS: belated
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is a real estate man, engaged also in the business of buying and selling sheep. He was a resident of Flandreau, South Dakota.

The contract sued on was one of two contracts, made at the same time, and pursuant to the same negotiations. They are both identical in all their terms, except that one called for a delivery of 2,200 lambs on September 1, 1916, and the other called for a delivery of 2,500 lambs, on September 25, 1916. Under the first contract, known in this record as Exhibit 13, the lambs were delivered on September 1st, and paid for. Under the other contract, the lambs were delivered on September 25th, but were not paid for. Plaintiff's suit is predicated upon this contract, known in this record as Exhibit A.

The defendant's cross-bill, however, treats both contracts as one, and asks to reform them both, and for relief under them, as so reformed. The general nature of defendant's contention is that the plaintiff agreed to guarantee a general average weight of all the lambs at 50 pounds, and a considerable percentage thereof at 60 pounds. This contention is denied by the plaintiff. If the defendant's contention at this point is sustained by the record, he is entitled to the reformation prayed, and to the consequent relief. If defendant is not entitled to such reformation, the

plaintiff is entitled to recover, in accord with the strict terms of the contract sued on. Exhibit A is as follows:

"This is to certify that I, C. P. Halver, of Flandreau, S. D., have this 25th day of August, 1916, bargained, sold and agree to deliver to Higgins Sheep Com. Co., the following described live stock at time, place, prices and under the conditions mentioned and described below.

"I guarantee the title to the live stock which I have sold under this agreement, and guarantee the stock when delivered will be in a merchantable, marketable condition, free from any and all infectious or contagious diseases, which guarantees state and Federal inspection.

"In consideration of and to complete this contract, I hereby acknowledge the receipt of \$625 as an advance payment, the balance to be due and payable upon the complete delivery of the stock and fulfillment of this contract.

"Description of Live Stock Sold.

No. Head	Description	Price	Time & Place of Delivery
2,500	Lambs	\$4.90	F. O. B. Cars Sept. 25,
		per	1916, Hettinger and
		Head	Griffin, N. D. In pro-
			portion to total number
			loaded at both places.
			These lambs not to be sort-
			ed, or topped out for mut-
			ton.

(Signed) C. S. Halver."

We need not set out Exhibit 13, which is identical, except as to number of lambs (2,200) and date of delivery (September 1st). The negotiations which resulted in these contracts began on the morning of August 19th, and continued up to the time of their consummation, August 25th. One week later, delivery was made, under Exhibit 13. These

negotiations were initiated by certain telegrams, as follows:

"Exhibit 3.

"Lemmon, S. D., Aug. 17, 1916.

"Higgins Sheep Com. Co., Sioux City, Iowa:

"Wire offer on four thousand to be weighed at Griffin Oct. 1st. Nothing under fifty pounds. To average sixty pounds or better. Halver."

"Exhibit 6.

"Sioux City, August 18, 1916.

"Halver, Sheep Man, Lemmon, S. D.:

"What will you contract four thousand lambs average sixty Griffin October first delivery. Higgins."

"Exhibit 5.

"Sioux City, August 18, 1916.

"Wire me at once how much per hundred you will pay me for twenty-five hundred to four thousand head delivered at Griffin or Hettinger October first to weigh average sixty pounds. Wire me your best offer as I have two offers now and will sell at the highest price this afternoon. Will sell by weight or head. C. P. Halver."

"Exhibit 4.

"Sioux City, Iowa, August 18, 1916.

"C. P. Halver, Sheep Man, Lemmon, S. D.:

"My man Baker leaves for Lemmon tonight. Will try buy your stuff. Higgins Sheep Com. Co."

Pursuant to the last telegram, W. M. Baker, employee of the defendant, arrived at Lemmon, South Dakota, August 19th, and started upon an inspection of the lambs owned by plaintiff, under executory contracts for future delivery; and such inspection continued for a period of 5 days. Baker was a man of 17 years' experience in the business. Halver was the owner of 18,000 or 20,000 lambs, in the sense

that he had entered into contracts of purchase to that extent with sheep owners, who were to deliver to him on September 1st and September 25th. The lambs thus contracted for were still in the custody of their original owners, and could be inspected in the separate flocks, respectively, of such original owners. There was a large number of these flocks, covering an extended territory in both South and North Dakota. The parties traveled by automobile from one flock to another, and Baker went through each flock, for the purpose of forming a judgment as to the quality and value of the lambs therein. One V. E. Baker also made the same trip with the parties, and conducted an inspection in his own behalf, as purchaser of the ewes of the same flocks. To avoid confusion, we shall use the initials of V. E. Baker, whenever reference to him is made. When initials are not used with the name Baker, reference will be had to W. M. Baker, the agent of the defendant herein. Baker completed his inspection August 23d, and the parties returned the same evening to Lemmon, South Dakota. In the meantime, he had sent to his principal one or more telegrams. On the morning of August 24th, he mailed to his principal the following letter, known in this record as Exhibit F.

"Lemmon, So. Dak., Aug. 24, 1916.

"Higgins Sheep Co. Co., Sioux City, Iowa,

"Dear Sir: I got into Lemmon Saturday afternoon and saw C. P. Halver. He and Halsted are the same. Halver lives at Flandreau, S. D., and has bought up a lot of lambs and ewes out here.

"I went out of here Sat. afternoon and we covered a large country south and west. He showed me a lot of lambs. I was not in reach of a wire until Wed. morning when I phoned a message to Lemmon for you from Bison. Reached Hettinger Wednesday afternoon and drove here last night; will go back to Hettinger this morning; will wait to hear from you there. Halver has around 25,000

lambs and sheep bought. As near as I find out he has paid \$4.00 to \$4.50 per head for lambs and \$4.25 for ewes. His lambs are to have about 50 culled out of each band, the owner keeping them. The bands run about 750 each. Some men not selling ewe lambs.

"He is going to cut out and keep 1,600 ewe lambs. But first, he is receiving at Griffin and Hettinger the 1st of Sept. After counting each man's flock, he will turn them all together, then cut out his ewe lambs at both places to make the 1,600. Then from what is left if he sells any to deliver F. O. B. he will cut ten each way through the chute until enough are cut out to make the count. Some of the bands at both places are good, some are not. There will be about 25 per cent fat I think, but they are not very heavy, would weigh 55 pounds on market. And if the sellers sort as he says, the feeders will run down to 38 or 40 pounds. He seems very set on \$4.90 per head, which is too high as they would not pay out even if all fat at the weights. He wants 25 cents per head down. He has cut out the Sept. 10th shipment and will only ship Sept. 1st and 25th. He has bought from 50 to 350 old ewes from the different bands and is selling them at \$4.75 to \$5.25 per head. The ewes in some places have lots of needles and some of the lambs also.

"I don't think I would care to contract lambs or ewes from him at present the way he wants to handle them. You might be able to do better by being present shipping day and buy just certain bands then. He has a lot of this stuff sold around Flandreau. Moxon has ordered 1,000 lambs. Halver is looking for too big a profit. And I don't see any money in them except the chance to buy at shipping time and that is slim. I met Mr. Waite last night and this morning and he said as I had seen conditions he would not write. I will go to Hettinger today and wait there to hear from you. Yours truly, W. M. Baker."

On the same date, Baker received from his principal

the following telegram, known in the record as Exhibit 8:

"Sioux City, August 24th, 1916.

"Walter M. Baker, Hettinger, N. D.:

"I want those lambs and will buy them provided I can get you to answer my inquiry so that I can form a correct opinion of what I am getting. Wire me how many lambs are for sale, if they are South Dakota or Montanas, kind of wool, what the entire band will average there, how many deliveries, what dates, how many each delivery, what percentage are fat in the entire bunch, how light they will run down, what percentage will be light, what per cent will weigh over sixty, lowest price delivered on cars, how much needed on contract. Stay where you are until further notice. Give me quick action. Higgins Sheep Com. Co."

Baker answered this telegram with Exhibit 7, as follows:

"Lemmon, S. D., Aug. 24, 1916.

"Higgins Sheep Commission Co., Sioux City, Iowa:

"About seven cars Sept. first. Seven to ten Sept. twenty fifth. Twenty five per cent first shipment fat, forty of second, tail ends thirty five to forty lbs. Dakota sheep, Cotswold, half Ramboulia. Average fifty lbs. Fifteen per cent sixty lbs. Rate Sioux City forty cents. Wire ans. Hettinger. See letter. W. M. Baker."

On the following day, Baker received from his principal the following telegram, known as Exhibit 15:

"Sioux City, August 25th, 1916.

/"Walter M. Baker, Hettinger, N. D.

"If those lambs clean from burrs, needles or culls thrifty and all can be bought at price named deliveries as stated written contract describing the lambs by brand fully identified with twenty-five to fifty cents per head paid down balance on delivery on cars agreeing now just how many there will be, not so many cars but so many head of lambs

buying even carloads, close the deal but make the best trade for me that you can. The market is lower on feeders expect you to buy them for less. Let me know what you do by wire follow by letter. Stay where you are for further advice. Higgins Sheep Commission Co."

The contracts in suit were entered into on the evening of that date. Exhibit 8 was shown by Baker to Halver. Halver participated in formulating Exhibit 7, said telegram being in his handwriting, except the words, "See letter." Baker testified that Halver agreed to guarantee the estimates appearing in Exhibit 7, whereas Halver testified in denial of this, and that these estimates were those of Baker, who had expert knowledge and judgment on the subject; that all these estimates had been incorporated by Baker in a lengthy telegram, just previously written by Baker, and that Exhibit 7 was a condensation of such lengthy telegram.

The conflict of evidence between these two witnesses at this point presents the crux of the case. In order to weigh the relative credibility of these conflicting witnesses, reference must be had to the circumstances antecedent to the contract, and to the conduct of the parties thereafter. Corroboration is claimed for Baker as follows: (1) In the telegram which initiated the negotiations. (2) In the fact that Exhibit 7 was written by Halver. (3) In the fact that, immediately after the signing of the contract, Baker wrote a letter to his principal, advising him that Halver had made such guaranty, which guaranty had been omitted by oversight from the contract.

We will not enumerate at this point affirmative corroboration claimed for the plaintiff, but will refer to the same later in the discussion.

As to the initial telegrams, it is clear, in the light of the whole record, that they sustain little relation to the con-

tract actually entered into. Halver's two telegrams called for an offer by wire, to be based upon weights. "Wire me at once how much *per hundred* you will pay," said Exhibit 5. "Wire offer on 4,000 *to be weighed* at Griffin," said Exhibit 3. Higgins wired no offer. He simply sent Baker upon the ground. Exhibit 5 also offered to sell by "weight or head." It is undisputed that there was no proposition considered between Baker and Halver of a sale by weight. Halver made a price to Baker of \$4.90 per head, and Baker went out on his tour of inspection with such proposition before him. It is not claimed that Baker ever made an offer, pursuant to the request of either of the initial telegrams. The price was made, not by Baker, but by Halver, at so much per head. The purpose of the inspection by Baker was to determine whether the identical sheep thus offered were worth the price. Of course, in the selection of a given number out of a larger number, a plan of selection, for the purpose of maintaining equality of average between those taken and those left, was involved. We see, therefore, little significance to be attached to the initial telegrams, as in any sense controlling the rights of the parties under the contract actually made.

As to the telegram, Exhibit 7, Halver is charged with notice of its contents, so far as material. The fact that he acted as a scribe in the writing of it has no other effect than this, there being no charge of fraud or collusion, as between him and Baker. There is no suggestion of guaranty in this telegram. There was none in telegram Exhibit 8, sent by Higgins. There was none in the letter, Exhibit F, written by Baker to Higgins, to which reference is made in the telegram, and of the contents of which Halver knew nothing. Exhibit 7 represented the actual opinion of Baker at the time. This opinion was based upon his inspection. His experience was much greater than that of Halver. Baker understood that. He testified:

"We went from band to band. At times, he described what he thought they would weigh, and told me there would be so many that could go to market as butcher stuff. That did not interest me, as I was to judge for myself what they were."

As we shall presently see, the recitals of Baker's letter, Exhibit F, have an important bearing at this point, and we pass it for the moment. Corroboration is claimed also for Baker in the alleged letter which he wrote to his principal on August 25, 1916, immediately after entering into the contract. The genuineness of this letter is challenged by the appellee, and we shall deal with that phase of the discussion in a later paragraph. This letter is known in the record as Exhibit 25. Baker states therein that Halver was to guarantee the quality and weight, but that this was omitted from the contract through his forgetfulness.

The defendant put in evidence, also, a letter known as Exhibit 11, purporting to have been written by him to Halver on September 5, 1916, after the receipt of the first shipment. The purport of this letter was, in effect, a rejection of the lambs received in the first shipment, as not being in compliance with the contract. No reply to this letter was received by him from Halver. This letter is challenged by the plaintiff as spurious, and as being no part of any actual correspondence. We shall deal with this feature in a later paragraph. The foregoing presents the salient features of defendant's case, so far as it relates to his right of reformation on the cross-bill. We may as well set forth here Exhibit C, being the letter by Higgins to Halver on September 21st, pertaining to the delivery to be made on September 25th, to which letter reference must be made in the later discussion. It was as follows:

"Sioux City, Iowa, Sept. 21, 1916.

"Mr. C. P. Halver, Hettinger, N. D.

"Dear Sir: We wired you in response to your telegram saying that our Mr. Baker would leave tonight and meet you at Hettinger. He will also desire to *see and accept the lambs* purchased on contract. Your wire to us of August 18th offered 2,500 to 4,000 lambs delivered Hettinger or Griffin, average 60 pounds, was the lambs under consideration when we sent Mr. Baker there at that time the purchase was made. Those already shipped do not come up to this average. Mr. Baker advised that owing to the railroad difficulty and congested conditions he received some lambs that he otherwise would not have done under normal conditions. We therefore expect the balance to be up to the understanding, and if you have more of the same kind as per your telegram of this morning we shall be in the market to buy them.

"Very respectfully yours,

"Higgins Sheep Commission Co.,

"JWH.M

Per J. W. Higgins."

With the foregoing exhibits before us, we may proceed to the discussion of the relative weight of evidence on the merits of the controversy.

II. Exhibit F is of prime significance. It represents Baker's understanding, at that time, of Halver's proposition, and his judgment of the quality and weights of the sheep which Halver proposed to sell. There is no suggestion in it of a guaranty by Halver. On the contrary, it negatives any suggestion of guarantee. The method of selection is specified in the letter:

"Then from what is left if he sells any to deliver F. O. B. he will *cut ten each way through the chute until enough are cut out to make the count.*"

From the foregoing, it is evident that the best sheep were not to be culled out for the purpose of this sale. If

Halver stood as a guarantor of the weights, there would be no occasion for the method of selection here pointed out. On the contrary, it would devolve upon Halver to make a selection at his own risk, which should comply with the guarantee. The purpose of the method here pointed out was to maintain the average of the flock, as between those sold and those left unsold. The lambs from the different flocks which had been inspected by Baker were to be delivered by their then owners to Halver on September 1st. The flocks were then to be mixed, and then the selection made, "ten each way through the chute." Suppose, for instance, that a sale had been made by wire on August 18th, pursuant to the initial telegrams of Halver, and by offer and acceptance based thereon, it would have devolved upon Halver to make his own selections, at his own peril, for the purpose of delivery under such contract.

This letter is wholly consistent with the contract as actually entered into on the evening of the following day, and is strictly corroborative of the correctness of such contract, as executed, unless it shall appear that, after the writing of the letter, and before the signing of the contract, some change was made in the proposition under consideration. After Baker received Exhibit 15, the final telegram from Higgins, he endeavored to get the price reduced, and offered \$4.75 per head. This offer was rejected by Halver. There is no dispute about this. Baker testified that, just before the contracts were entered into, Halver agreed to guarantee the weights, according to the telegram, Exhibit 7. The credibility of this particular testimony and its circumstances will be considered in a later paragraph. Sufficient to say, at this point, that we find that there was no change made in the proposition of Halver, as outlined in Exhibit F by Baker. The contracts, as drawn, provided for delivery F. O. B. at *Griffin and Hettinger*. There is no dispute about this feature. If Halver were to guarantee

weights, these would be the weights at time and place of delivery. The contract was drawn by Baker, upon blank forms furnished by his principal. The contract, as drawn, contemplated a qualified guaranty. The subject of guaranty was not forgotten. The contract expressly declares a guaranty and qualifications thereof. This is a strong circumstance, of itself, to negative the claim of forgetfulness on the subject of guaranty. Baker testified that he discovered the omission from the contract, the same evening that the contracts were made. He admits that he did not mention the subject to Halver. He was with Halver constantly, for two days thereafter. Nor did he, during that time, mention the subject of mistake in the contract. No plausible explanation is offered of his failure in this regard. After three or four days' absence, Baker returned to receive the delivery, on September 1st. He did receive the delivery. He testified that the method of selection agreed on was the same as stated in Exhibit F. This was the method actually followed in the selection, except that a larger number was substituted for the number "10," for the purpose of more rapid work. It is virtually undisputed that Baker received his allotment from the identical bands of sheep which he had inspected. V. E. Baker, the purchaser of the ewes, was present, and took delivery at the same time of the ewes from which the lambs were separated. The lambs being loaded, the delivery by Halver was complete. Baker so recognized it, and paid for the lambs at \$4.90 per head, in strict accord with the terms of the contract. Nor was there anything said, up to this time, about any mistake in the contract, or about any guaranty of weights. Six hundred forty of the lambs were billed to Canton, and the remainder to Sioux City, where they arrived on September 4th or 5th. The lambs were not weighed at the time of delivery, nor were they weighed on arrival at Sioux City. The only evidence we have of actual weights

of these lambs is the estimate of witnesses who saw them. No reason appears upon this record why we should deem the estimate of their weights in Sioux City as any more reliable than the estimates made by Baker before they were shipped. They necessarily suffered shrinkage in weight, as well as loss of quality, in the long shipment. The day of their shipment was the day of their weaning, and they could not be expected to thrive greatly, during the ensuing three or four days. The delivery was F. O. B. Hettinger and Griffin. Deterioration and shrinkage were inevitable, as the defendant well knew. Though we were to find that there was a guaranty of weights, yet the burden would be on the defendant to prove the deficiency of weights at Hettinger and Griffin. The very fact, however, that their weights were not taken, either at the place of delivery or on arrival at Sioux City, indicates strongly the mutual understanding of the parties that no weighing was contemplated, under the contract.

On this branch of the case, therefore, we deem it clear that the conduct of Baker was wholly inconsistent with any claim of forgetfulness or mistake in the terms of the contract, and that his acceptance of delivery thereunder of the identical lambs contracted for by him was an affirmation of the contract as actually made, and that it is not now subject to reformation upon any ground known to the defendant prior to such acceptance. Needless to say that the delivery by plaintiff and the acceptance and payment by the defendant constituted a full execution of the contract by both parties.

III. Our foregoing conclusion finds further confirmation in the circumstances attending delivery and acceptance of the lambs under the second contract, being Exhibit A. The second delivery was to be made on September 25th. On September 21st, Higgins wrote to Halver the letter Exhibit C, hereinbefore set forth. This letter advised Halver

that Baker will "meet you at Hettinger. He will also desire to see and accept the lambs purchased on contract." The foregoing leaves no doubt of the authority of Baker "to see and to accept." He appeared at Hettinger on September 23d, and remained there until the cars were loaded, on September 25th. He was there when the bands of sheep were brought in. He saw the process of mixing the different bands. The same method of selection as before was adopted. Nor, up to this time, had he ever made any claim of mistake in the contract. V. E. Baker was present at this time, also, to receive the ewes from which Baker's lambs were taken. There can be no question, under this record, as to the identity of the lambs delivered to Baker, as being the same as those he inspected. At this time, only one question of dispute arose. Baker claimed a cut-back on certain bands of sheep, because of long-tails and peewees, etc. By a cut-back is meant a rejection or setting aside of certain sheep, as not being included within the fair contemplation of the contract. Under the general practice of sheep raisers, the tails of lambs are cut off at shearing time. The "long-tailed" are lambs born after shearing time, and the "pee-wees" are the youngest of them. Baker claimed a cut-back of 225, and this was acceded to by Halver. The others were all accepted and loaded, to the number of 2,160. Three cars, comprising approximately 1,000 lambs, were billed under defendant's orders to Roscoe, South Dakota. The others were billed to the defendant at Sioux City. Though Baker accepted these lambs, he did not pay for them. He made the excuse that he had no check, and the further excuse that it was too late to get into the bank (as it was); and that, therefore, he could not draw a draft. He told Halver that the purchase price would be remitted to him from Sioux City. This conduct on the part of Baker was not in good faith, but was done pursuant to a ruse on the part of Higgins.

The shipment arrived at Sioux City on September 28th. When the Roscoe shipment arrived, does not appear. Two days before their arrival, Higgins departed for Montana, and did not return until the 5th of October. Before going, he left instructions with his clerk to have the lambs weighed when they arrived, and, if they averaged under 50 pounds, to refuse payment. The lambs were not weighed at Hettinger or Griffin. It does not appear that those shipped to Roscoe were weighed there. Baker testified that he saw the Sioux City consignment weighed on September 28th. He produced certain figures of weights. These figures show that 1,151 weighed 50,730 pounds, or an average of a little above 44 pounds. Pursuant to her instructions, Higgins' clerk refused payment. On October 5th, Halver had a conference with the defendant, and, on the same day, began this suit to recover on contract, Exhibit A. At no time prior to the beginning of the suit did Baker or Higgins claim to Halver that there was any mistake or oversight in the contract. Having obtained possession of these sheep from plaintiff, by purported acceptance thereof under the contract, and having avoided payment therefor by a mere ruse, is defendant entitled now to the aid of a court of equity to reform this contract, on a ground known to him since August 25th? He claims to have put himself in the attitude of a mere bailee, and to have rejected the shipment, and to have refused to receive it. But he *did* receive it at Hettinger and Griffin. Baker was his *alter ego*, sent there for that very purpose. By accepting delivery at the contract place of delivery, and causing the shipment of the lambs to Roscoe and to Sioux City, he put it out of the power of the plaintiff to produce evidence of the actual weights of these lambs, as they were at the time of delivery, or, for that matter, as they were thereafter. The delivery was a complete performance of the contract by Halver, according to its terms as actually made. If Higgins claimed

there was a mistake in the contract which should be corrected, whereby the delivery thus made by Halver would not be a compliance with the contract as reformed, ordinary good faith required Higgins to say so in advance of his ruse. Even if his grounds of reformation were originally good, it would be inequitable to permit him to withhold them from the plaintiff while he was dispossessing him of the subject-matter by purported acceptance, and thereby putting it out of the plaintiff's power to produce material evidence on the new issues which would be made by reformation.

We are clear that the defendant could not accept these lambs in Hettinger and reject them in Sioux City or in Roscoe. He is not suing for damages for breach of warranty. He is, in effect, rescinding the contract by rejecting the subject-matter on the ground of noncompliance, and treating the same as a mere consignment to a bailee. Baker's act in selecting and receiving the lambs at Hettinger and consigning them to the four winds must be deemed as having some legal effect. It was either a rejection or an acceptance. It could not be both. It could not be neither. It was not a rejection. He then and there delivered to Halver a receipt for the same, as follows:

"Exhibit B.

"Received of C. P. Halver, 2,160 lambs at Griffin, Sept. 25, 1916.

"W. M. Baker,

"Of Higgins Sheep Com. Co.

"At \$4.90."

This writing was not only a receipt for the lambs, it amounted, in legal effect, to a due bill. The amount due thereunder was a mere matter of computation: "2,160 lambs at \$4.90." Halver could have based his present action upon this due bill alone. This, too, was a clear confirmation of the contract, as actually made. If action had

been brought upon this receipt, could the defendant have obtained a reformation of the original contract upon grounds known to him at the time, and before the receipt was given? The delivery of this receipt and the acceptance thereof by Halver necessarily passed the title and right of possession of the lambs to the defendant, and was as much an affirmative acceptance of the lambs under the contract by defendant as would have been the delivery of a check in payment of the purchase price; and this is so even if there had, in fact, been a guaranty, under which the defendant might have maintained an action for damages. Whatever the right of defendant would have been under the guaranty, if one were proved, it would not have been a right to disaffirm the contract or to reject the delivery, once accepted, with full knowledge at the time of every fact which he claims to know now.

IV. Let it be supposed that the contract had been drawn so as to include the specifications of the telegram Exhibit 7 as a guaranty. This would have called for 15 per cent to average 60 pounds, and for the whole to average 50 pounds at Hettinger and Griffin. This is the reformation asked for by the cross-bill. 50 pounds weight at Hettinger would not be 50 pounds weight at Sioux City or at Roscoe. When Higgins directed his clerk to reject the shipment, if it weighed less than an average of 50 pounds at Sioux City, he was directing a breach of the contract in advance, and setting up a standard for the guidance of his clerk to which he was not entitled, even under a reformed contract. The amount of shrinkage which such a shipment would suffer, under the circumstances attending this shipment, is uncertain under the evidence. Under the defendant's evidence, the shrinkage is estimated at from 2 pounds to 4 pounds per head. Under the plaintiff's evidence, it could have been 8 pounds. Those weighed at Sioux City were a little more than half of the number delivered. Whether those shipped

to Roscoe would have averaged more or less is a mere matter of estimate.

V. There are certain items of evidence in the record which involve the veracity of Higgins and Baker as witnesses. The defendant put in evidence the letter Exhibit 11, which purported to be written by himself, on September 5, 1916, to Halver. Higgins identified the letter, and testified to mailing the same. The letter is as follows:

"Sept. 5, 1916.

"Mr. C. P. Halver,

"Flandreau, S. D.

"Dear Sir: Referring to the lambs you have shipped on our contract will say that as a whole they do not come up to specifications, of course this consignment is only about 50 per cent of the whole and it depends to some extent upon what the balance are as to how many of these will go in on our contract, there is an extremely long light 'tail-end' many of which are culls and not thrifty, these I could not take at all, and I am not sure just how it would suit you best to have them handled.

"Therefore inasmuch as they are here and not salable as they are, and it will be very expensive to hold them in the yards here until the balance comes, I suggest buying some feed for them near here, dipping and putting them out where they will do the most good for themselves pending the arrival of the balance, then I can use what come within my contract and no doubt satisfactory disposition can be made of the rest or if preferable you can feed them for market yourself.

"Or if you prefer selling the light end at once we will handle them for you to the best advantage possible, advising however that just at present there is practically no demand for these extremely light cully stuff and they will sell very low.

"Kindly give this your prompt attention as if we are

to have any interest in the top end we want to know it without delay so we may place them on our orders and avoid unnecessary expense.

"Very respectfully yours,
Higgins Sheep Commission Co."

"JWH

Defendant also put in evidence Exhibit 25, which purports to be a letter from Baker to the defendant, dated August 25th, and purporting to have been written immediately after the signing of the contracts. This letter was identified by Baker, and the mailing thereof testified to by him. This letter purported to be a report of the contracts entered into, and closed with the following paragraphs:

"Halver agreed and guaranteed to sell and deliver lambs according to description in message sent to you describing weights and condition and per cent of fats and tail ends. He agreed to have lambs of this sort, making them as described. I intended to put description in contract, but forgot same. I will get the message from agent at time of delivery."

Exhibit 15, which is a telegram from Higgins to Baker, was received by Baker just before the contracts were entered into. Baker testified that he showed this telegram to Halver before the purchase was made, and that it was at this time that Halver agreed to guarantee weights, and that, thereupon, the contracts were immediately drawn. This telegram has hereinbefore been set forth. The plaintiff contends that Exhibit 11 is a fabrication; that the same is true of Exhibit 25; and that the claim that Exhibit 15 was shown by Baker to plaintiff is manifestly and consciously false.

As to Exhibit 11, the purported letter of September 5th from Higgins to Halver, no such letter was ever received by Halver. Higgins did write a letter to Halver on September 5th, which was received, and which is in evidence. It is entirely silent on the matters appearing in Exhibit 11.

On September 6th, Halver was in Sioux City, and spent several hours with Higgins. They lunched together and talked business. Not a word was said by Higgins as to having sent the letter Exhibit 11. Halver testified that none of the complaints now appearing in Exhibit 11 were made orally to him. There was nothing said about a guaranty, and nothing said about rejecting the shipments. Higgins' only denial of this testimony is the following:

"No more was said to Halver than that there were a great many lambs in there that would not come within the contract."

And yet, according to his later attitude at the trial, he was, at that very time, holding the shipment as a rejected shipment, and holding the same at Halver's expense. He was also waiting for a reply to his alleged letter of the day before. He knew that Halver must have left home for Sioux City before such letter could have reached him by mail. Halver left him that day, entirely unconscious of friction or material dissatisfaction over the shipment. Higgins must have had in his possession at that time Baker's letter of August 25th, which is Exhibit 25, but he made no mention of it, or of any guaranty, or of any alleged mistake in the contract. On September 21st, Higgins did write to Halver the letter Exhibit C, hereinbefore set forth. This letter is quite inconsistent with the prior existence of Exhibit 11. Neither is there any suggestion here of any mistake in the contract, nor of any guaranty, except such as shall be implied from the first telegram of August 18th.

When Exhibit 11 was first put in evidence, the defendant testified that it had been dictated by him to his stenographer, and by him regularly mailed. On cross-examination, he was given until the next day to produce the stenographer's notes. Being recalled on the next day, he testified that the letter was not dictated to his stenographer, but

was written by himself. The other letter written by him to Halver on September 5th *was* dictated by him to his stenographer. It will be noted that Exhibit 11 is a somewhat lengthy letter, and one which a busy man would be more likely to dictate to his regular stenographer than to write himself; and this is especially so, in view of his having kept a copy of it. No explanation was attempted by the witness as to any reason for the method adopted by him. It was upon this letter that the defendant, at the trial, predicated his alleged rejection of the shipment, and his holding the same as bailee, at the expense of Halver. The burden was upon him to prove the genuineness of the letter as a part of the actual correspondence. The circumstances here indicated are too damaging to justify us in holding that such burden was met.

Turning now to the letter from Baker of August 25th to Higgins, being Exhibit 25, such letter, of course, whatever its contents, was not binding upon Halver. The developments of the trial, however, might have rendered it admissible as corroboration of Baker in his claim of mistake in the contract. From the nature of the case, the plaintiff cannot prove the alleged spuriousness of this portion of that letter by direct evidence. Reliance is had upon the circumstances. If the letter written by Baker on August 25th, as a report of the purchase, contained this paragraph, then Higgins knew of the alleged guaranty and the mistake in the contract immediately, and before receiving any deliveries. He never mentioned any mistake or guaranty in any of the correspondence between him and Halver. He did not mention it in the visit of September 5th. He completely ignored it in his letter of September 21st, wherein he made claim under the telegram of August 18th. The conduct of Baker in ignoring the subject has already been set forth, and need not be repeated. This letter was produced at the last day of the trial. All other correspondence

had been placed in the hands of defendant's attorneys, at the beginning of the litigation. This letter had not. It was alleged to have been kept in the defendant's safe, until the day of its production. The only explanation offered by the defendant of the circumstances here indicated was that he had no recollection of receiving the letter. This fact would, of course, explain his conduct. Is it not also very strong evidence that he never did receive it in this form? If he had received it, would he be likely to have forgotten information so important, in view of his alleged rejection of the first shipment? The further circumstance appears that this letter, if written at all, was written at Lemmon, South Dakota, from the same hotel as the letter Exhibit F, which was written the day before. The letter produced was written upon the stationery of the Higgins Sheep Commission Company. In explanation of that, Baker testified that he always carried stationery. But the letter Exhibit F was written upon the stationery of the hotel at Lemmon. Halver testified to the circumstances of Baker's obtaining such hotel stationery, in that Baker then said to the landlady that he had no stationery with him. Halver's testimony as to this statement is not denied by Baker, nor is any explanation offered. When we find further, upon all the evidence in the case, that the statement contained in such paragraph was not, in fact, true, the improbability of its having been included in the letter is somewhat intensified. We think the circumstances here shown are too damaging to justify us in finding that the defendant has shown this letter to have been a part of the regular correspondence.

Baker testified that, before the close of the contracts, he disclosed to Halver the telegram Exhibit 15, hereinbefore set forth, and that it was then that Halver agreed to the guaranty. This is denied *in toto* by Halver. A perusal of Exhibit 15 contradicts the probability of such a course.

It was a strictly confidential telegram from Higgins to Baker. Its first sentence was:

"If those lambs clean from burrs, needles or culls thrifty and all can be bought at price named * * * close the deal but make the best trade for me that you can. The market is lower on feeders expect you to buy them for less."

To show this telegram to Halver was to advise him that Baker was under final instructions to pay him his price, unless he could do better. It is undisputed that Baker did make him a final offer of \$4.75, which Halver rejected. It is significant, also, that this telegram indicated the specifications to be included in the contract. There was no reference therein to any guaranty. We think the improbability of the truth of Baker's testimony at this point is so great as to be quite conclusive corroboration of the testimony of Halver.

VI. The point is made in the briefs for appellant that, because Halver did know the contents of telegrams Exhibits 8 and 7, he was thereby aware of a limitation upon the au-

thority of Baker, and that, in effect, he

2. APPEAL AND
ERROR: review,
scope of: be-
lated and in-
consistent
theory on ap-
peal.

could not enter into a binding contract with him, in excess of such authority. It is enough to say, in that connection, that nothing is predicated, in answer or cross-bill,

upon any alleged act on the part of the

agent in excess of authority. There is not an averment on that subject. We have no occasion, therefore, to consider it. Enough has been said to indicate our reasons for the conclusion which we reach. The opinion is already of undue length. We have gone into the details of the evidence more than we would ordinarily, because, upon our first consideration of the case, some of us reached the conclusion that the defendant should prevail. We are satisfied, upon the whole record, that the trial court properly dismissed the cross-bill, and rendered judgment for plaintiff for the

value of "2,160 sheep at \$4.90" each, in substantial accord with the terms of the receipt and due bill given by Baker on September 25th, at the time of the second delivery.—*Affirmed.*

LADD, GAYNOR, and STEVENS, JJ., concur.

WEAVER, C. J. (dissenting). I am unable to concur in the foregoing opinion. As I read the record, it does not sustain the views of the majority as to the contract made by the parties, by the terms of which their rights should be measured. I cannot agree that Exhibit A, or that such exhibit in connection with Exhibit 13, constitutes the entire undertaking of the respective parties, but rather, consider that the correspondence had between the parties, culminating in the execution of the exhibits named, is to be read with them in determining their nature and effect.

The plaintiff was the moving party in the negotiations, and, by tracing the correspondence in its chronological order, the point I am trying to make will be clear.

On August 17, 1916, plaintiff telegraphed to defendant, saying that he had 6,000 lambs for sale, and soliciting an order. To this, defendant at once responded by wire, asking:

"What do you want for 6,000 lambs? What are the deliveries, and at what point?"

On the same or following day, plaintiff telegraphed again:

"Wire offer on 4,000, to be weighed at Griffin, October 1. Nothing under 50 pounds. To average 60 pounds or better."

Still again, on the same day, plaintiff telegraphed once more:

"Wire me at once what you will pay me for 2,500 to 4,000 head delivered at Griffin or Hettinger October 1, to weigh average 60 pounds. Wire me your best offer as I

have two offers now and will sell at the highest price this afternoon will sell by weight or head."

At this point, defendant responded, saying:

"My man Baker leaves for Lemmon tonight. Will try to buy your sheep."

It was at this stage of the proceedings that Baker went to Dakota, as stated by the majority. After Baker had made more or less inspection of the flocks, and obtained an offer from plaintiff, he telegraphed to defendant, saying:

"Halver offers 7 cars lambs September 1st Hettinger and Griffin. Average 50 pounds one fourth fat balance good feeders. Ten cars Sept. 25. Some real good. Wire me today Hettinger. Last shipment guaranteed sixty."

To this message, the defendant answered:

"I want those lambs and will buy them providing I can get you to answer my inquiry so I can form a correct opinion of what I am getting. Wire me how many lambs are for sale; if they are South Dakotas or Montanas, kind of wool, what the entire band will average, what dates, how many each delivery, what percentage are fat in the entire bunch, how light will they run down, what percentage will be light, what percentage will weigh over sixty, lowest price delivered on cars, how much needed on the contract. Give me quick action."

When Baker received this message, he showed it to plaintiff, and plaintiff himself prepared and formulated the answer, as follows:

"About 7 cars Sept. 1. Seven to ten Sept. 25, 25 per cent. first shipment fat, 40 of second. Tail-ends 35 to 40 pounds. Dakota sheep. Cotswold, half Ramboulia. Average 50 pounds. 15 per cent 60 pounds."

This message, sent to defendant on August 24, was promptly answered by message to Baker, as follows:

"If those lambs clean from burrs, needles or culls, thrifty and all can be bought at price named, deliveries as

stated, written contract describing the lambs by brand fully identified with 25 to 50 cents per head paid down balance on delivery on cars, agreeing now just how many there will be, not so many cars but so many head of lambs, buying even carloads, close the deal but make the best trade for me you can."

Immediately on receipt of this dispatch, the so-called contracts, Exhibits A and 13, were made by plaintiff and Baker.

It will be seen that Baker's agency was strictly limited to buying the lambs described, on the terms which had been reported to the defendant, and that this limitation was fully known to the plaintiff; and it seems to me like shutting our eyes to the light, and ignoring the fundamental principles of the law of contracts, which exact fair and honest dealing between buyer and seller, to say that, in this transaction, plaintiff may deliver or tender to the defendant lambs of a quality and value distinctly inferior to those described in his offer of sale, and be allowed to recover therefor a price which had been fixed in consideration of his repeated assurance that the animals he was selling were of a superior and more valuable grade. The clause in defendant's final telegram, telling Baker to make the best deal he could for his principal, was written in connection with the specific limitations there placed upon his authority, and cannot fairly be construed as being more than a request to secure better terms, if he could; but it surely did not operate as authority to make a more unfavorable bargain than had been reported to the defendant. The plaintiff was in no manner deceived or misled. He had, from the outset, particularly described to defendant the kind and quality of lambs he professed to have for sale. That description, without material variation, was repeated at each step of the bargaining. He knew, also, that, when Baker had reported his offer to defendant, the latter had

again insisted on knowing the facts, before consummating the purchase, and he then, himself, in his own handwriting, wrote out the final telegram to defendant, again describing the lambs, their condition and weight; and it was only on receiving this information that defendant directed the purchase to be made.

Personally, I do not believe any reformation of the contract is required, to entitle defendant to avail himself of his defense, but think that it is entirely within the province of the court, even in an action at law, to say that the correspondence between the parties, culminating in the execution of Exhibits A and 13, should all be construed together, as containing the agreement between the parties.

The fact that Baker was present in Dakota, and assisted in receiving and shipping the lambs, is not material, for the reason already suggested: that he had no authority to buy the lambs, if they were not substantially such as had been described by the plaintiff; and defendant was, therefore, under no obligation to repudiate Baker's act, until it became known to him on the arrival of the shipment in Sioux City.

For the reasons stated, I am of the opinion that the judgment appealed from should be reversed.

IN RE ESTATE OF HETTA A. SANFORD.

CONVERSION: Equitable Conversion—Extent to Which Doctrine

- 1 **Carried.** The doctrine of equitable conversion of realty into personalty will not be carried further than is *imperatively* necessary in order to carry out a testator's intent.

TAXATION: Collateral Inheritance—Proceeds of Foreign Real

- 2 **Estate.** The proceeds of foreign real estate belonging to a resident testator are subject to the succession tax of this state when such real estate has, from imperative necessity, been converted into personalty, in order to pay legacies to collateral

heirs, even though such proceeds have not been manually brought into this state, and are subject to a succession tax under the laws of the foreign state. (Sec. 1481-a, Code Supp., 1913.)

EXECUTORS AND ADMINISTRATORS: Ancillary Administration

- 3 **Turning Over Funds.** It will be presumed that the courts of a sister state will promptly order its ancillary administrator to turn over funds to the principal administrator in this state when such action is necessary to pay debts.

TAXATION: Collateral Inheritance—Equitable Conversion of For-

- 4 **ign Lands—Limitation.** The doctrine of equitable conversion of realty into personalty will not, in an estate consisting of both domestic and foreign realty, be carried so far in the interest of the succession tax of this state, and to the detriment of general residuary legatees, as to compel the conversion of *all* such foreign lands into personalty and the application of the *entire* proceeds to the discharge, in this state, of money legacies. To so do might bring the entire estate under our succession tax, though part of the estate might be foreign realty passing in fee. In the instant case, *held* that the transfer of the residuary estate should be here taxed in the proportion that the total net value of the estate in the foreign state bears to the total net value of the entire estate.

TAXATION: Collateral Inheritance—"Debts"—Federal and Suc-

- 5 **cession Taxes.** Neither succession taxes nor Federal inheritance taxes are "debts" against an estate in such sense that they may be deducted in the computation of the state succession tax. (Sec. 1481-a2, Code Supp., 1913.)

TAXATION: Collateral Inheritance—"Debts"—Income and Cur-

- 6 **rent Taxes.** Accrued Federal income taxes, and current general taxes lienable at the death of decedent, are proper deductions in computing state succession taxes. (Sec. 1481-a2, Code Supp., 1913.)

Appeal from Cass District Court.—J. B. ROCKAFELLOW,
Judge.

DECEMBER 19, 1919.

REHEARING DENIED MARCH 17, 1920.

THIS is an appeal from the finding and decree of the

district court of Cass County, holding the estate of Hetta A. Sanford liable for the payment of a collateral inheritance tax. E. H. Hoyt, treasurer, F. M. Nichols, executor, Charles W. Sanford, Daisy R. Sanford, and other residuary legatees appeal.—*Reversed in part and remanded.*

H. M. Havner, Attorney General, *B. J. Powers*, *Tom C. Whitmore*, and *E. M. Willard*, for appellants.

D. J. Flaherty, for appellees.

STEVENS, J.—Hetta A. Sanford, a resident of Cass County, Iowa, died testate on December 20, 1916, seized and possessed of real and personal property of the approximate value of \$230,000. Of this amount, \$35,054.

1. CONVERSION:
equitable conversion; extent
to which doctrine carried.

69 was personal property; and the rest, real estate situated in Iowa, Nebraska, and Missouri. The Missouri land was devised in fee, and does not enter into our consideration in this case. Her will made money bequests to the extent of \$147,800 to various collateral relatives, friends, missionary societies, colleges, and other societies or institutions. The following is the residuary clause of the will:

"If after all my just debts are paid, and all of the foregoing gifts and bequests are paid and satisfied it should be found that there still remain a portion of my property that has not been disposed of, I desire that such undisposed of property shall be divided share and share alike between my son, Charles W. Sanford, my daughter-in-law, Daisy R. Sanford, and my sister, Martha H. Ayres."

The case involves few, if any, disputed questions of fact, and was submitted largely upon an agreed statement of facts, from which it appears that the net value of the estate in Iowa, subject to the collateral inheritance tax, was \$84,428.56 (on which the tax, amounting to \$4,221.43, was promptly paid by the executor), and of the real estate and

other property in Nebraska, which includes \$6,796.25 received as rental therefrom, was \$110,986.37. The controversy arises out of the attempt of the treasurer of the state of Iowa to collect an inheritance tax upon the Nebraska property. The will was admitted to probate by the district court of Cass County, Iowa, on the 23d day of January, 1917, and Frank M. Nichols was appointed executor; and, on July 23, 1917, same was admitted to probate in Saunders County, Nebraska, upon a duly certified and authenticated copy of the will and of its probate by the district court of Cass County, and Frank M. Nichols was appointed executor in that state. Except a small amount of money, none of the personal property or proceeds of the sale of the Nebraska real property has been brought into this state by the executor, but \$56,850 thereof has been paid to various legatees named in the will, the amount paid to each being 75 per cent of the legacy. The court below found this amount subject to the succession tax, and directed the executor to pay \$2,842.50, with interest thereon, to the treasurer of state, but found that the real estate in Nebraska, except that actually used to pay legacies, did not come within the statutes or jurisdiction of this state. The Iowa real estate sold by the executor consisted of 720 acres in Adair County, and the Nebraska real estate, of 320 acres in Saunders County and a large tract in York County.

I. It is not claimed by counsel for appellants that real property situated outside of this state, as such, is subject to the payment of a succession tax in this jurisdiction, but that, by the terms of the will of Hetta A. Sanford, there was an equitable conversion of all of her real estate, and that, under the provisions of Section 1481-a, Supplement to the Code, 1913, the same became subject to the tax in this state. Section 1481-a is as follows:

"The estates of all deceased persons, whether they be

inhabitants of this state or not, and whether such estate consists of real, personal or mixed property, tangible or intangible, and any interest in, or income from any such estate or property, which property is, at the death of the decedent owner, within this state or is subject to, or thereafter, for the purpose of distribution, is brought within this state and becomes subject to the jurisdiction of the courts of this state, or the property of any decedent, domiciled within this state at the time of the death of such decedent, even though the property of such decedent so domiciled was situated outside of the state, except real estate located outside of the state passing in fee from the decedent owner, which shall pass by will or by the statutes of inheritance of this or any other state or country, or by deed, grant, sale, gift, or transfer made in contemplation of the death of the donor, or made or intended to take effect in possession or enjoyment after the death of the grantor or donor, to any person, or for any use in trust or otherwise, other than to or for the use of persons, or uses exempt by this act shall be subject to a tax of five per centum; * * *

The doctrine of equitable conversion has been so often defined and discussed by the courts of this and the other states of the Union as to require little more than a restatement of the conditions under which same will arise, and to make application thereof to the facts of this case. The general rule was stated in *Hanson v. Hanson*, 149 Iowa 82, as follows (quoting from *Darlington v. Darlington*, 160 Pa. 65):

“To work a conversion of real estate into personalty, there must be either (a) a positive direction to sell; (b) an absolute necessity to sell, in order to execute the will; or (c) such a blending of realty and personalty by the testator in his will as to clearly show that he intended to create a fund out of both real and personal estate, and to bequeath the same as money. In the first, the intention to convert is

expressed; in the latter two, it is implied. A bare power of sale, like a discretionary power given in a will, does not work a conversion, until exercised.' Again, it has been said in effect that: 'Equitable conversion arises from an express, clear, and imperative direction, or from a necessary implication of such express direction. The question of conversion is one of intention, and the question is, Is it the testator's intent to have his real estate converted into personalty immediately upon his death?' (citing *Clift v. Moses*, 116 N. W. 144)"

The will in question did not contain positive directions to sell any of the real estate. The personal property amounted to only \$35,054.69, of which amount approximately two thirds were required for the payment of debts and the expenses of administration; so that it was necessary for the executor to sell a large portion of the real estate, to pay the legacies provided by the will. It is contended by counsel for appellant that this necessity worked an equitable conversion of at least so much of the real estate of testator as was required for the payment of the legacies, amounting to \$147,800. Unless, however, an absolute, imperative necessity to sell the real estate, or some part thereof, in order to carry out the terms and provisions of the will, is shown, an equitable conversion did not result. If, on the other hand, such absolute, imperative necessity existed, then the intention of the testator to work an equitable conversion of the real estate will be implied. *Hanson v. Hanson*, supra; *Beaver v. Ross*, 140 Iowa 154; *In the Matter of the Estate of Bernhard v. Henning*, 134 Iowa 603; *Swisher v. Swisher*, 157 Iowa 55; *Inghram v. Chandler*, 179 Iowa 304; *Ramsey v. Ramsey*, 226 Pa. 249 (75 Atl. 420); *Isenburg v. Rose*, (N. J.) 99 Atl. 615; *Harris v. Ingalls*, 74 N. H. 339 (68 Atl. 34); *Chick v. Ires*, (Neb.) 90 N. W. 751; *Griffith v. Witten*, 252 Mo. 627 (161 S. W. 708); *Greenman v. McVey*, 126 Minn. 21 (147 N. W.

812); *Stake v. Mobley*, 102 Md. 408 (62 Atl. 963); *In re Tailer*, 147 App. Div. 741 (133 N. Y. Supp. 122); *Lynch v. Spicer*, 53 W. Va. 426 (44 S. E. 255); *Becker v. Chester*, 115 Wis. 90 (91 N. W. 87); *Appeal of Clarke*, 70 Conn. 195 (39 Atl. 155).

Manifestly, the facts disclosed make it certain that testator must have intended an equitable conversion of at least a part of her real estate, which took place immediately upon her death, for the purpose of executing and carrying out the terms of her will. *Beaver v. Ross*, supra; *In the Matter of the Estate of Bernhard*, supra; *Swisher v. Swisher*, supra; *Inghram v. Chandler*, supra; *Hanson v. Hanson*, supra.

There was an equitable conversion, however, only to the extent that the sale of real estate was imperatively necessary to pay the pecuniary legacies and otherwise carry out the intention and purpose of the testator. *Duffield v. Pike*, 71 Conn. 521 (42 Atl. 641); *McHugh v. McCole*, 97 Wis. 166 (72 N. W. 631); *Painter v. Painter*, 220 Pa. 82 (69 Atl. 323); *Boyce v. Kelso Home*, 107 Md. 190 (68 Atl. 550); *Kolars v. Brown*, 108 Minn. 60 (121 N. W. 229); *James v. Hanks*, 202 Ill. 114 (66 N. E. 1034).

But it is earnestly argued by counsel for appellees that, even though there was an equitable conversion of a part or all of the real estate of testatrix situated in the state of

Nebraska, it is not liable to the payment of a succession tax in this state, for the following principal reasons: (a) That no part of the proceeds of the sale of the Nebraska

2. TAXATION:
collateral inher-
itance: proceeds
of foreign
real estate.

property has ever been brought into the state of Iowa, or within the jurisdiction of the courts of this state; (b) that the administration of the estate in Nebraska is wholly independent of the administration in Iowa, and that the court is without jurisdiction to compel the executor to transfer

the money from Nebraska into this state for distribution, and that same will be distributed under the order and direction of the probate court of Nebraska; (c) that all of the property situated in the state of Nebraska is subject to a collateral inheritance tax in that state, and it would be unjust and inequitable for another tax to be imposed thereon in this state; (d) that equitable conversion should not be applied for the purpose of giving the proceeds of the sale of the Nebraska land a constructive situs in Iowa, in order to subject same to liability or an inheritance tax in that state; (e) that, as it was not necessary to convert the residuary estate into money to effect a distribution thereof, it passed to the legatees as real estate, although in fact converted into money. On the other hand, appellant asserts that there was an equitable conversion of the entire estate, and, therefore, under the section of the statute quoted, *supra*, it is all liable to the succession tax in Iowa. We will dispose of these several propositions in the order stated.

(1) It is not material that no part of the proceeds of the sale of the real estate situated in Nebraska has been transferred by the administrator to Iowa, in so far as it is necessary to use the same in the payment of legacies, as the succession or transfer of personal property of the decedent, wherever situated, is subject to the imposition of a tax at the domicile of such decedent. *In re Estate of Weaver*, 110 Iowa 328; *Norris v. Loyd*, 183 Iowa 1056; *In re Hodge's Estate*, (Cal.) 150 Pac. 344; *State v. Dalrymple*, 70 Md. 294; *Magoun v. Illinois Tr. & Sav. Bank*, 170 U. S. 283 (42 L. Ed. 1037); *United States v. Perkins*, 163 U. S. 625 (41 L. Ed. 287); *In re Dingman's Estate*, 66 App. Div. 228 (72 N. Y. Supp. 694); Ross on Inheritance Taxation, Section 173. The tax is not imposed upon the property, but upon the succession. *In the Matter of the Estate of Stone*, 132 Iowa 136; *Herriott v. Potter*, 115 Iowa 648; *Maxwell v.*

Bugbee, 250 U. S. 525. The principles upon which this class of taxes rests are stated in *Magoun v. Illinois Tr. & Sav. Bank*, supra, as follows:

"They [inheritance taxes] are based on two principles: (1) An inheritance tax is not one on property, but one on the succession; (2) the right to take property by devise or descent is the creature of the law, and not a natural right, — a privilege; and, therefore, the authority which confers it may impose conditions upon it. From these principles it is deduced that the states may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions; and are not precluded from this power by the provisions of the respective state constitutions, requiring uniformity and equality of taxation."

And this is true whether the transfer takes place by will or descent. *Appeal of Gallup*, 76 Conn. 617 (57 Atl. 699); *White v. Howard*, 46 N. Y. 144; *Gilman v. Gilman*, 52 Me. 165; *Wells v. Wells*, 35 Miss. 638; *Penfield v. Tower*, 1 N. D. 216 (46 N. W. 413).

It is true that, in a sense, the administration of the estate in Nebraska is independent of the administration in Iowa. The executor in Nebraska is under the jurisdiction and direction of the Nebraska court; but counsel concedes, in harmony with the holding of the courts everywhere, that the administration in Nebraska is ancillary. But,

3. EXECUTORS AND ADMINISTRATORS: ancillary administration turning over funds.

in the administration of estates, it often becomes necessary, for the payment of debts and in making distribution, that property in the possession of the ancillary administrator be turned over to the administrator of the domicile; and usually, as a matter of comity, such transfer is ordered by the court having jurisdiction of the ancillary administrator, without question. *In re Estate of Gable*,

79 Iowa 178; *O'Conner v. Root*, 130 Iowa 553; *Douc v. Lillie*, 26 N. D. 512 (144 N. W. 1082); *Cochran v. Martin*, 47 Ala. 525; *Welch v. Adams*, 152 Mass. 74 (25 N. E. 34); *Dalrymple v. Gamble*, 66 Md. 298 (7 Atl. 683); *Welles' Estate*, 161 Pa. 218 (28 Atl. 1116); *Churchill & Bailey v. Boyden*, 17 Vt. 319. We entertain no doubt that our neighboring state, between whose citizens and the citizens of Iowa there are such intimate social and business relations, will enforce this rule of comity, in reciprocation of the well-settled policy of the courts of this state in dealing with the ancillary administration of estates. As we understand the record, the executor has ample funds in this state for the payment of any tax that may be imposed, based upon the value of the personal property in Nebraska.

(2) What has already been said in effect disposes of appellee's contention that the personal property in Nebraska cannot be taken into consideration in fixing the tax in this state, for the reason that a similar tax will be imposed and collected in Nebraska, resulting in double taxation. Whatever real merit may be claimed for counsel's position, the courts uniformly hold that a tax may be imposed by the state in which the property has its situs, and also in the state of the domicile. Each jurisdiction exercises its own separate and independent power of taxation, and there is no conflict. *In re Estate of Weaver*, 110 Iowa 328; Ross on Inheritance Tax, Section 173; Dos Passos on Law of Collateral Inheritance, Legacy and Succession Taxes, Chapter 4; *In the Matter of the Estate of Hartman*, 70 N. J. Eq. 664 (62 Atl. 560); *In re Estate of Merriam*, 141 N. Y. 479 (36 N. E. 505); *Keeney v. Comptroller of State of New York*, 222 U. S. 525 (56 L. Ed. 299); *O'Conner v. Root*, supra.

(3) Much reliance is placed by counsel for appellant upon the holding of the Pennsylvania court that, where there is an equitable conversion of real property, situated

in a foreign state, for the purpose of paying legacies, it becomes and passes as personalty, in such a sense that it is subject to the succession tax (*In re Estate of Handley*, 181 Pa. 339 [37 Atl. 587]; *Vanuxem's Estate*, 212 Pa. 315 [61 Atl. 876]); and by counsel for the executor and numerous legatees who have appealed upon the contrary holding of the New York, Massachusetts, and Illinois courts (*In the Matter of the Estate of Swift*, 137 N. Y. 77 [32 N. E. 1096]; *In re Estate of Baker*, 67 Misc. Rep. 360 [124 N. Y. Supp. 827]; *In re McKinlay's Estate*, 166 N. Y. Supp. 1081; *Connell v. Crosby*, 210 Ill. 380 [71 N. E. 350]; *McCurdy v. McCurdy*, 197 Mass. 248 [83 N. E. 891]). But it seems to us that this point is fully settled by Section 1481-a of the 1913 Supplement, which provides that all property, real, personal, or mixed, "tangible or intangible, and any interest in, or income from any such estate or property, which property is, at the death of the decedent owner, within this state or is subject to, or thereafter, for the purpose of distribution, is brought within this state * * * at the time of the death of such decedent, even though the property of such decedent so domiciled was situated outside of the state, except real estate located outside of the state passing in fee from the decedent owner, which shall pass by will or by the statutes of inheritance of this or any other state or country * * * shall be subject to a tax of five per centum."

Money used for the payment of specific legacies, although derived from the sale of real property, the sale of which was imperatively necessary to carry out the provisions of the will, passes as personalty, and became such by equitable conversion, immediately upon the death of decedent, and therefore title in fee to the land converted did not pass to the legatees. The above statute is broad and comprehensive, and clearly includes all property

transferred to collateral heirs or legatees, without reference to the form or character thereof, or where situated, except real property not situated in Iowa, the title to which passed to such heirs or legatees in fee. In this case, only that part of the residuary estate that is located in Nebraska is exempt from the tax in this state.

III. Having arrived at the conclusion that there was an equitable conversion of so much of the real property of decedent as was necessary to pay the specific pecuniary be-

4. TAXATION:
collateral in-
heritance:
equitable con-
version of for-
eign lands:
limitation.

quests, a part of which was situated in Iowa and a portion in Nebraska, although the land in the latter state was sold by the executor appointed herein, upon application to and under the authority of the probate court of Nebraska, and that this state is, nevertheless, entitled to collect a succession tax based upon the value thereof, the same as though it had been personal property of the decedent situated in this state, at the time of his death, we have yet to determine whether all or any part of the residuary estate is liable to the payment of a tax. There is also a question of the deductions allowed by the probate court in Nebraska, but this matter will be given consideration hereafter.

As already stated, all of the real property in Iowa and Nebraska, except a tract in Dickinson County, Iowa, was sold by the executor, and hence the residuary estate will be distributed in the form of money. All of the real property, whether passing to specific or residuary legatees situated in this state, is subject to the payment of the tax. The difficulty presented is to locate the residuary estate. As to this, clearly, there was not an equitable conversion. The title thereof passed to the legatees, subject to the payment of debts, expenses of administration, and specific bequests. The residuary estate comprises only that portion of the

whole that will be left after the payment of debts, expenses, and the other legacies provided by the will. The will does not designate any particular property, nor is there anything therein to indicate that testator had a preference as to what portion of the estate should be reserved for the residuary legatees. They take what is left from the estate as a whole, without reference to its location. If, however, the proceeds of the sale of the Nebraska realty are all applied to the payment of specific money bequests, for the purpose of collecting a tax upon the entire residuary estate in Iowa, we ignore the fact that the residuary estate is taken out of the estate as a whole, and not alone out of the real estate in Iowa. Real property situated in another state, passing in fee, cannot be taxed in Iowa. The statute of Nebraska providing for the imposition of a succession tax, although not in evidence, is Section 6622, Revised Statutes of Nebraska, and is similar to Section 1481-a, *supra*, but is more specific and somewhat broader in scope, perhaps, particularly in its application to property of nonresidents. Our attention has been called to no decision of the Nebraska court dealing with property passing to residuary legatees in which the estate was partly in Nebraska and partly in a foreign state. It seems to us, however, that a perfectly fair and just rule would be to treat the residuary estate as situated partly in Iowa and partly in Nebraska, instead of so marshaling the assets as to make all, or so much thereof as possible, liable to the tax in this state. We therefore hold that the transfer of the estate to the residuary legatees should be taxed in Iowa, in the proportion that the total net value of the estate in Nebraska and the total net value of the estate in Iowa bear to the total net value of the whole estate. A different rule prevailing in another jurisdiction might require some modification of the above rule, in dealing with property having its situs in such juris-

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diction. While we have been unable to find authorities directly in point, the following cases, among others not cited, have some bearing, at least, upon the rule just stated: *Wieting v. Morrow*, 151 Iowa 590; *Kingsbury v. Chapin*, 196 Mass. 533 (82 N. E. 700); *McCurdy v. McCurdy*, supra; *In re Estate of Gable*, 79 Iowa 178; *Tilford v. Dickinson*, 79 N. J. L. 302 (75 Atl. 574).

The court, in *Wieting v. Morrow*, supra, dealt with a controversy involving the imposition and collection of the succession tax in Iowa upon the transfer of personal property therein, belonging to an estate having its primary administration in New York. The will gave the widow an undivided one third of the entire estate. The executrix in New York conceded that the property liable to the payment of the tax and that exempt therefrom should be so marshaled and distributed that the property in Iowa would be applied pro rata to every provision of the will. On the other hand, the defendant contended that the assets of the estate should be so marshaled as to exempt no part of the property in Iowa from the tax. The court said:

"That the widow is entitled by the express provisions of the will to take an undivided one third of the property located in Iowa, as well as of that located in New York, seems to us very clear. Being entitled to take it, she takes it exempt from the tax under the statute. It is also clear that, if she is entitled to a life estate in any 'rest and residue,' she is entitled to take that also exempt from any tax. How the 'rest and residue' can be determined in such case is a more difficult question. But the concessions of the plaintiff relieve us from the necessity of determining what her utmost right might be. As already indicated, she concedes that, after appropriating one third of the Iowa property for herself, as widow, the remaining two thirds should be first charged *pro rata* with the payment of all debts and legacies, and that her life estate in Iowa property should be

limited to the 'rest and residue' remaining after such application. We find nothing in the statute which would justify a larger claim against the plaintiff than she thus concedes. The exact situation here presented is not covered by the express terms of the statute; but the basis contended for by plaintiff responds to the spirit of the statute, and leaves little room for fair controversy."

The supreme court of Kansas, in *State v. Davis*, 88 Kan. 849 (129 Pac. 1197), construed a statute of that state so as to exempt the property in Kansas of a decedent who, at the time of his death, was a resident of another state, from the tax, provided the state of the domicile grants a like exemption, the purpose being to avoid double taxation. The court, in the course of its opinion, said:

"We think the spirit of the Kansas act is that, where property in this state owned by a nonresident at the time of his death has been subjected to an inheritance tax in the state of his residence, a similar tax ought not to be required here, except in cases where, if the conditions were reversed, and a nonresident of this state had died, owning the same character of property in the other state, a payment there would be exacted. That spirit is effectuated by considering that the exemption of the Kansas statute operates for the benefit of the estate of a resident of any other state, the law of which would not exact an inheritance tax with respect to similar property in that state, owned by a resident of Kansas at the time of his death, no matter how dissimilar the statutes may otherwise be. In other words, the exemption made by the laws of another state is to be regarded as like that of the Kansas statute, in any circumstances in which, if the conditions were reversed, it would have a like operation."

The total net value of the estate in Nebraska, upon the basis of expenses and deductions made in that state, is

\$110,986.37, and in Iowa, upon the same basis, \$84,428.50; but we do not undertake to ascertain the amount of the residuary estate, nor the amount of tax to be paid in this state. All of these matters will be left to be ascertained and settled by the court below, upon the basis and in harmony with the views expressed in this opinion.

IV. The right of the executor in Nebraska to make the following deductions in Nebraska, and to hold same exempt from the payment of a tax in this state, is challenged by counsel for appellant. They are as follows:

- | | |
|---|--|
| 5. TAXATION:
collateral inheritance:
"debts." Federal and succession taxes. | \$410.65, repairs made and claimed by appellant to have been contracted for on the Nebraska farms after the death of testatrix;
\$317.61, income tax paid the United States government; and \$3,268.14, Federal inheritance. The deductions allowed in this state are such as come within the provisions of Section 1481-a2, which is as follows: |
|---|--|

"The term 'debts' as used in this act shall include, in addition to debts owing by the decedent at the time of his death, the local or state taxes due from the estate in January of the year of his death, a reasonable sum for funeral expenses, court costs, the cost of appraisement made for the purpose of assessing the collateral inheritance tax, the statutory fees of executors, administrators, or trustees estimated upon the appraised value of the property, the amount paid by the executor or administrator for a bond, the attorney fee in a reasonable amount, to be approved by the court, for the ordinary probate proceedings in said estate and no other sum; but said debts shall not be deducted unless the same are approved and allowed by the court within eighteen months from the death of the decedent, as established claims against the estate, unless otherwise ordered by the judge or court of the proper county."

The question whether inheritance taxes due other states upon the succession to property of a decedent whose

domicile, at the time of his death, was in this state, and Federal income and inheritance taxes, shall be allowed as deductions has not previously been before this court. The Supreme Court of Connecticut, in *Corbin v. Baldwin*, 92 Conn. 99 (101 Atl. 834), held that the amount of inheritance and state taxes paid in New Jersey, together with income taxes paid to the government, should be deducted in ascertaining the amount of the estate subject to tax. In *Hooper v. Shaw*, 176 Mass. 190 (57 N. E. 361), the Supreme Court of Massachusetts held that Federal inheritance taxes should be deducted; and the Supreme Court of Pennsylvania, in *Knight's Estate*, 261 Pa. 537 (104 Atl. 765), held to the same effect.

On the contrary, the New York court, in *In the Matter of the Estate of Bierstadt*, 178 App. Div. 836 (166 N. Y. Supp. 168), held that Federal inheritance taxes should not be deducted. As we understand it, state inheritance taxes are not figured as deductions by the United States treasury, in the computation of the Federal tax. It seems to us that our statute limits the deductions that may properly be made, to the items referred to in Section 1481-a2, supra. Neither the succession nor Federal inheritance taxes are debts against the estate, but are taxes imposed upon the right of succession, and are not allowable as deductions, under our statute. Nor are they to be treated as expenses of administration. *People v. Union Trust Co.*, 255 Ill. 168 (99 N. E. 377). The item of indebtedness for repairs was apparently incurred some time before the death of testatrix. It was, therefore, a valid claim against her estate, and should be allowed as a deduction.

The income tax and state tax paid in Nebraska, if the latter became a lien upon the real property of decedent in that state prior to her death, should, we think, be allowed

as deductions. While neither were due and payable at the time of her death, the amount of the state taxes had been ascertained, and it was the duty of the executor to make a return of the income for the year expiring January 31, 1916. Testatrix died in December. If, however, the item mentioned includes taxes levied after the death of testatrix, they should not be allowed as deductions. As the decree of the court below is not in harmony with the views herein expressed, it follows that, in so far as the same does not accord therewith, it is set aside and modified. We have not undertaken to compute the tax upon the basis indicated, nor are we sure that the record before us would permit this to be done. The cause will, therefore, be remanded to the court below, with directions to ascertain and compute the tax due the state of Iowa in harmony with this opinion, and, if necessary, to take further evidence to enable this to be done. If, however, counsel desire, and agree upon a decree, they may have same entered in this court.—*Reversed in part and remanded.*

LADD, C. J., WEAVER and GAYNOR, JJ., concur.

DAVID R. JONES, JR., Appellee, v. ILLINOIS CENTRAL RAILROAD COMPANY, Appellee, et al., Appellant.

PROCESS: Foreign Corporation—Coupon Tickets. The sale in this state by a resident carrier of a ticket which, under traffic arrangement with a foreign carrier, routes the passenger over the lines of such foreign carrier, does not make the selling carrier the agent of the foreign carrier; neither does such sale constitute a "doing of business" in this state by such foreign carrier. (Sec. 3529, Code Supp., 1913; Sec. 3532, Code, 1897.)

Appeal from Dubuque District Court.—J. W. KINTZINGER,
Judge.

DECEMBER 19, 1919.

REHEARING DENIED MARCH 17, 1920.

APPEAL from the action of the district court in refusing to set aside a default judgment for want of service upon the defendant the New York Central Railroad Company, it appearing that the service relied on to give jurisdiction was made on the ticket agent of the Illinois Central Railroad Company at Dubuque, Iowa, by whom the ticket, with coupon connection over the New York Central, was sold. The court refused to set aside the default, held the service sufficient, and the New York Central appeals.—*Reversed.*

Lyon & Willging, for appellant.

Kenline & Roedell, for appellee.

GAYNOR, J.—This is an appeal from the action of the district court in overruling a motion filed by the New York Central Railway Company to vacate and set aside a judgment by default entered against it. This company appeared specially, for the purpose of challenging the jurisdiction of the court to enter this judgment by default. It challenged the jurisdiction on the ground that the defendant was a nonresident of the state of Iowa, and that the attempted service of the original notice upon it did not confer jurisdiction upon the court to entertain the suit, or to enter any default or judgment against it. The notice called in question was served upon the ticket agent of the Illinois Central Railway Company, at Dubuque.

The facts are that, prior to the 12th day of July, 1915, plaintiff purchased from the defendant the Illinois Central Railway Company, at Dubuque, a first-class coupon ticket from Dubuque to New York City, over its line and over the

lines of the New York Central Railway Company. Plaintiff took passage on the ticket at Dubuque, and, on the 12th day of July, was forcibly ejected from and denied transportation on a train operated by and upon a line of the New York Central Railway Company, although he presented this ticket for transportation. Suit was begun against both companies, based on these facts. The only service of the original notice on the appellant was made on the ticket agent of the Illinois Central Railway Company in charge of the ticket office of the Illinois Central Railway Company at Dubuque, the same agent who sold the ticket to the plaintiff before referred to. The ticket was an ordinary coupon ticket, and on its face entitled the plaintiff to ride over the lines of the Illinois Central Railroad Company to Chicago, and thence over the New York Central Railway to New York City.

The court denied defendant's motion, and from this action the New York Central appeals, and presents for our consideration the following questions:

"1. Did the district court of Dubuque County, Iowa, acquire jurisdiction over the defendant New York Central Railway Company by the service of the original notice on an agent of the Illinois Central Railway Company, its co-defendant, at Dubuque, Iowa?

"2. Does the fact that the agent of the Illinois Central Railroad sold a ticket over his own line, and also over the lines of the New York Central, a connecting line, in and of itself constitute the agent so selling the ticket the agent of the connecting line?

"3. Did the service of notice upon the agent of the carrier selling the ticket confer jurisdiction over the connecting carrier, which has no line of railway within the state of Iowa, where the ticket was sold, transacts no business therein, and is not a resident of the state?"

In the determination of this case, two statutes of our own state are involved, all found in the Code of 1897, reading as follows:

"Sec. 3529. If the action is against any corporation or person owning or operating any railway * * * or against any foreign corporation, service may be made upon any general agent of such corporation, company or person, wherever found, or upon any station, ticket or other agent or person transacting the business thereof or selling tickets therefor in the county where the action is brought; if there is no such agent in said county, then service may be had upon any such agent or person transacting said business in any other county.

"Sec. 3532. When a corporation, company or individual has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of that office or agency."

From the affidavits filed in the cause, it appears that the New York Central is an incorporated company, organized and existing under the laws of the states of New York, Pennsylvania, Ohio, Michigan, Indiana, and Illinois; that it has always been a resident of those states; that its principal place of business is in the state of New York; that it has duly authorized agents in the states aforesaid, upon whom service can be made; that it has never been a citizen or resident of the state of Iowa; that it never did or transacted any business within the state of Iowa, except such as is involved in the sale of coupon tickets over its lines by other companies within this state; that it has no principal place of business or other office in the state of Iowa, except as the same may be inferred from the fact that other companies in the state of Iowa, in selling tickets over their own

lines, sold coupon tickets over this company's lines. It operates no lines and controls none in the state of Iowa.

It further appears that, during the time covered by this controversy, the Illinois Central Railway Company had and maintained a station at Dubuque, Iowa, at which place it sold tickets for carriage of passengers over its own lines to Chicago, and from thence east over the lines of the New York Central; that, at its station at Dubuque, and through its agents there located, it collected the full fares, including that part for transportation over the road of the New York Central Railway Company, and accounted for and turned over to the New York Central fares thus collected for the part of the transaction covering the latter's lines; and that this method of doing business was authorized by the New York Central Railway Company, through general traffic arrangements between connecting carriers and the said company.

There is some showing that the New York Central did transact business in Iowa through a freight solicitor, and had an office at Dubuque for that purpose, and that it had a traveling passenger ticket agent; but it affirmatively appears that the person on whom the notice was served was not the freight solicitor, and was not in charge of any office at Dubuque controlled by the defendant; and it does not appear that the traveling ticket agent resided in or transacted any business for appellant in Iowa. There is nothing in this record to show that the New York Central had done, or at the time of this transaction was doing, any business in the state of Iowa through the Illinois Central Railway, except as the same may be inferred from the fact that tickets were sold by the Illinois Central Railroad in the state of Iowa, good over the lines of the New York Central as a connecting carrier. There is no evidence that this agent on whom service was made represented the New York Central,

or had authority to transact any business for the New York Central, other than such as may be inferred from the fact that it sold a ticket good over its own line to Chicago, with a coupon ticket attached, good over the lines of the New York Central.

The selling carrier acts for itself. It has its own agent; it has its own station and agents for the transaction of business in that station; and these are entirely under its control. Its primary purpose is to sell tickets over its own line. Under traffic arrangements, it may route its passengers over the lines of connecting carriers beyond its terminus. It receives the full fare from the passenger. It reimburses the connecting carrier out of the amount received from the passenger for its services in carrying the passenger over the connecting line. This in no sense makes the selling carrier the agent of the connecting carrier in the sale of the ticket to the passenger. The connecting carrier, under the traffic arrangements, agrees simply to perform a part of the services which the selling carrier has contracted to render the passenger, and is reimbursed by the selling carrier out of the amount received, to the extent of the services so rendered by the connecting carrier.

In order that a court of this state may acquire jurisdiction over any person, it must appear that the person over whom it seeks jurisdiction was, at the time, subject to the jurisdiction of the state courts. Before a foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, it must appear that it is subject to the jurisdiction of the courts of the state; that it is doing business within the state in such manner and to such an extent as to warrant the inference that it is present in the state at the time. Before a defendant can be brought into any court, he must be subject to the jurisdiction of the court. The service of process is only for the purpose of subjecting

him to the jurisdiction of the particular court whose jurisdiction is invoked. Unless the defendant is subject to the jurisdiction, the service of process does not confer jurisdiction. The process only draws the body of the defendant into the particular court for the purpose of a particular transaction. The defendant must be subject to the jurisdiction before he can be drawn by process and subjected to its jurisdiction; or, in other words, the corporation must be present in the state, either in person or by authorized agents, before the jurisdiction of the state court attaches. It is made subject then to the jurisdiction of the particular court by the service of process. As said by Justice Brandeis, in *Philadelphia & Reading R. Co. v. McKibbin*, 243 U. S. 264 (61 L. Ed. 710):

"A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the state in such manner and to such an extent as to warrant the inference that *it is present there*. And even if it is doing business within the state, the process will be valid only if served upon some authorized agent."

In that suit, the service was challenged. The record disclosed the following facts: No part of the defendant's railroad was situated within the state of New York. It had no freight or passenger ticket office or any other office or any agent or property therein. Like other railroads distant from New York, it sent into that state, over connecting carriers, loaded freight cars, shipped by other persons, which cars were, in course of time, returned. The carriage within that state was performed wholly by such connecting carriers, which received that portion of the entire compensation paid by the shipper therefor. The defendant company received only that portion of the compensation payable for the haul over its own line. The Central Railroad of New Jersey was such a connecting carrier. It is

sued there the customary coupon ticket over its own and connecting lines, including the defendant company. The whole ticket was issued by the Central Railroad of New Jersey in New Jersey. In the tickets there was a separate coupon for the journey over each of the connecting roads, and the coupon for the journey over each of such roads bore also its name. In the ultimate accounting between the carriers, each received that portion of the fare which was paid for the journey over its own line, and it was said:

"Obviously, the sale by a local carrier of through tickets does not involve a doing of business within the state by each of the connecting carriers."

If it did, nearly every railroad company in the country would be "doing business" in every state. Even hiring an office, and the employment by a foreign railroad of a "district freight and passenger agent" to solicit and procure passengers and freight to be transported over the defendant line, and having under his direction "several clerks and various traveling passenger and freight agents," were held not to constitute "doing business within the state."

The holding of that case is that the selling of coupon tickets by a resident company over connecting lines of a foreign company does not make the seller of such ticket the agent of the foreign company in the transaction. The act of selling, by the local company, is not the act of the connecting company, so as to justify the inference that it is transacting business within the state, and, therefore, present in the state, and subject to its jurisdiction. And it is said that to hold otherwise would be to say that every foreign company over whose lines coupon tickets are sold is, for the purpose of suit, a resident of the state in which the selling company is operating, and would have the effect of forcing these companies to defend in these foreign courts against any suit which might be begun in any state

in which a connecting carrier sold a coupon ticket over its lines, though the wrong complained of was within the state of the foreign corporation's domicile.

It will be noted that, in the *McKibbin* case, *supra*, the defendant was a foreign corporation; that the service was made upon its president while he was traveling within the territory over which the court had jurisdiction. He was traveling, however, not on the business of the corporation, but on private business, at the time, and therefore did not bring the corporation into the district with him. He was not representing the corporation or transacting corporation business in the district at the time the service was made upon him. The plaintiff undertook to show that the foreign corporation itself was doing business in the district at the time, and, therefore, was present in the district at the time service was made upon its president. The court, however, held that the selling of a coupon ticket over its lines, by an agent of a local company within the district, did not constitute the doing of business within the district in such manner and to such an extent as would warrant the inference that it was present and doing business in the district.

The logic of the holding is that the local company's act in selling a coupon ticket over a connecting carrier's line was not the act of the connecting carrier. If it was the act of the connecting carrier, then the connecting carrier was doing business in the district. The logic of the opinion is, further, that the local company by whom the ticket was sold was not the agent of the connecting carrier in the transaction of that business.

Applying the logic of the case to the facts here, we must hold that the act of the Illinois Central, through its local agent at Dubuque, was not the act of the New York Central, and no inference can be drawn from the act that this company was present in Iowa, and doing business within the state. To give the court jurisdiction, therefore, it

must appear that what was done warrants the inference that this company was present in the state of Iowa. Its presence must be evidenced by some act done in the state of Iowa which indicates that it is doing business in the state of Iowa. If the facts shown here in this case do not justify that inference,—and the *McKibbin* case holds they do not,—then the New York Central was not present in Iowa at the time the ticket was sold, and the selling of tickets by the Illinois Central did not bring the corporate entity within the jurisdiction of the state of Iowa. But even if we should assume that there is evidence that it was doing business in the state of Iowa, other than is involved in this act, no jurisdiction was acquired in this case, because the service of notice was made upon no agent authorized by it to transact business in the state of Iowa. Of course, a corporation does all its business through agencies, and is bound by the act of its authorized agents, and, when doing business in the state of Iowa in such a way as to warrant an inference of its presence in the state of Iowa, notice may be served upon an agent transacting business for it in the state. This, by virtue of our statute. But to bring the corporation within the jurisdiction of the court for any purpose, it must appear that the process that draws it into the jurisdiction of the court was served upon some agent of the corporation doing business for the defendant in the state of Iowa, in such manner as justifies the inference that this corporation is present in Iowa.

So it would appear that, on both propositions, the notice was insufficient to draw this corporation within the jurisdiction of this court; or, in other words, the defendant sought to be charged must be subject to the jurisdiction of the court, and, to be charged, must be brought within the jurisdiction of the court by proper notice. Unless the person sought to be charged is subject to the jurisdiction of

the court, no notice served upon him brings him within the jurisdiction of the court for any purpose. If it is subject to the jurisdiction of the court, it may be brought before the court by proper notice, and the court, having jurisdiction of the subject-matter, then assumes jurisdiction of the person. In the case of a corporation, which acts only through agents, it must appear that the corporation is present in the state, and subject to the jurisdiction of the state courts. It may be brought then into the jurisdiction of the particular court by the service of original notice; but that notice, to be effectual, and to draw the corporation within the jurisdiction of the particular court, must be served upon the corporation, and the service becomes effectual as a service upon the corporation when it is served upon any of the agents designated by the statute on whom service is authorized to be made. Though a corporation be within the jurisdiction of the court, service upon one not authorized by the statute, or upon one who does not represent the corporation in the state, is not service upon the corporation; and that is the situation here. We think the decision in the *McKibbin* case is conclusive upon the contentions made here. See, also, opinion of Judge Reed, of the Northern District of Iowa, in *McGuire v. Great Northern R. Co.*, 155 Fed. 230.

Upon the whole record, we think the district court erred in holding that it had jurisdiction of the defendant in this case; that it should have sustained defendant's motion to set aside the default and judgment; that it erred in not doing so. Its judgment is, therefore,—*Reversed*.

LADD, C. J., WEAVER and STEVENS, JJ., concur.

A. W. KRUEGER, Appellant, v. R. D. RAMSEY, Appellee.

MUNICIPAL CORPORATIONS: Vacation of Streets. Principle recognized that cities and towns have plenary powers to vacate streets, and thereafter convey the same, so long as the property owner is afforded reasonable opportunity to pass to and from his property. (Sec. 751, Code Supp., 1913; Sec. 883, Code, 1897.)

MUNICIPAL CORPORATIONS: Proceedings of Council—Councilman Interested in Result. An ordinance vacating a street, passed by the vote of a councilman who was to be personally benefited by receiving the fruits of the vacation, is void. (Sec. 668, Par. 14, Code Supp., 1913.)

CERTIORARI: Existence of Other Remedy. A private party, aggrieved by the vacation of a public highway, is not necessarily driven to a writ of certiorari to test the validity of the vacation. *He may proceed in equity.*

INJUNCTION: Void Vacation of Street. Injunction will lie to obtain relief from a void vacation of a public highway.

Appeal from Shelby District Court.—J. B. ROCKAFELLOW, Judge.

DECEMBER 19, 1919.

REHEARING DENIED MARCH 17, 1920.

ACTION to enjoin the defendant from obstructing a public highway, and to require him to remove from the public highway obstructions wrongfully placed by him therein. Decree dismissing plaintiff's petition. Plaintiff appeals.—*Reversed.*

G. W. Cullison, for appellant.

E. S. White, for appellee.

GAYNOR, J.—For the past 30 years, plaintiff and his grantors have been the owners of the north half of the

southwest quarter of Section 17, Township 79, Range 40 West of the 5th P. M., in Shelby County, Iowa, and, in connection therewith, used the highways in controversy. Plaintiff's buildings are near the southeast corner of his land. Prior to the happening of the matters herein complained of, there was a road running south from the southeast corner of plaintiff's premises to a public highway running east and west along the south side of said section. The road on the south side of Section 17 was legally established and well traveled. There was another road, running east from the southeast corner of plaintiff's premises, about 80 rods long, to the town of Portsmouth. The road running south from the corner of plaintiff's premises aforesaid was 66 feet wide. The road running east to Portsmouth was 33 feet wide. These were the only roads furnishing ingress and egress to plaintiff's land. Both these roads were within the corporate limits of the town of Portsmouth, and it is an incorporated town.

On and prior to 1896, the Milwaukee Land Company was the owner of the southwest quarter of the southeast quarter of Section 17, and, while it was such owner, it granted to the town of Portsmouth two roads, one off the north side of its 40, 33 feet wide, and one off the west side of its 40, 66 feet wide. The land for these roads was subsequently conveyed by the Milwaukee Land Company to the city by deed, and these are the roads in controversy. After these deeds were made, these roads were thrown open to public travel, and used by the public until the happening of the matters hereinafter complained of. Subsequently, the Milwaukee Land Company conveyed to the defendant, Ramsey, its said 40, except so much as was covered by the highways in controversy, and Ramsey has used and occupied the premises so purchased from the Milwaukee Company, and is still occupying it. In the year 1918, the defendant. Ram-

sey, took possession of the public highways in controversy, and put up barriers to prevent the public and the plaintiff from traveling over the same.

This action is brought to compel him to remove the obstructions so placed in the highways, and to enjoin him from further obstructing the same.

It will be noted that the fee to the land covered by these highways was in the town of Portsmouth; that, when Ramsey bought this 40, he took it subject to the rights of the city under its deed, and the right of the public to travel over these highways. If nothing further appeared, Ramsey would have no right to close the roads or to interfere with travel upon the same. It appears, however, that Portsmouth is an incorporated town, and that, prior to this action of Ramsey's, complained of, attempted by ordinance to vacate the 66-foot road running south from plaintiff's corner, and to deed the land covered by it to Ramsey. It is upon this action on the part of the town that Ramsey asserts the right to close this road. It will be noted that both the roads were taken off the Ramsey 40, to wit, the southwest quarter of the southeast quarter of Section 17. We need not consider any claim made by plaintiff to the 33-foot road running east from his corner, for the reason that, on the hearing, the court found that the north and south road from defendant's corner had been vacated by the town, and the land covered by it deeded to Ramsey, and that Ramsey had a right to obstruct it, and dismissed plaintiff's petition, in so far as it sought any relief against Ramsey with respect to that road, but found for the plaintiff as to the 33-foot road running east, thus leaving this 33-foot road open to the plaintiff to travel at his will in going to the town of Portsmouth. While some question is made as to whether or not it had any jurisdiction over the territory covered by the roads, we think a fair reading of the record shows, beyond any reasonable dispute, that they are

within the jurisdiction of the town, and that the town had authority to act in respect to the same.

Plaintiff alone appeals.

The question for our determination involves only the north and south road on the west side of the southwest quarter of the southeast quarter of Section 17. The determination of the case turns upon the action of the counsel in vacating this road, and deeding the territory covered by the same to the defendant, Ramsey.

That a city or town has a right, under the statute, to vacate public streets, alleys, and highways within its jurisdiction, is not disputed. That right is conferred upon the city or town by the statute. Section 751 of the Code of 1897 provides:

"Cities and towns shall have power to establish, lay off, open, widen, straighten, narrow, vacate, extend, improve and repair streets, highways, avenues, alleys, public grounds," etc.

It has been the uniform holding of this court that the general assembly has full power over streets, and may vacate or discontinue the public easement in them, and may invest municipal corporations with this authority. It has further been held that, in all cases where the title was vested in the city, the city or town, upon vacation, may deed the property so vacated, although, upon deeding, the public right to use them is destroyed. Upon this point, see *McLachlan v. Town of Gray*, 105 Iowa 259; *Spitzer v. Runyan*, 113 Iowa 619; *City of Marshalltown v. Forney*, 61 Iowa 578; *Harrington v. Iowa Cent. R. Co.*, 126 Iowa 328; *City of Lake City v. Fulkerson*, 122 Iowa 569; *Walker v. City of Des Moines*, 161 Iowa 215; and *Hubbell v. City of Des Moines*, 173 Iowa 55, and 183 Iowa 715.

When it is remembered that cities and towns are charged with the duty to maintain and keep in repair all public highways within their jurisdiction, devoted to public use,

we appreciate the wisdom of the statute which allows them to avoid their responsibility by a vacation of a street, and withdrawing it from the public use. There are, however, some limitations upon this right, that are well recognized: that is, where public highways, streets, and alleys are laid out for public use, and private rights have been acquired in the land abutting on them, and the exercise of the right of vacation may operate to the injury of the abutting property owner, he may be entitled to insist that the right existing of ingress and egress may not be totally destroyed, and, if destroyed, that he have a right to recover damages on account thereof. But we think it will not be seriously questioned that even a property owner has not a right of ingress or egress from all points of his property to the prejudice of the public interest, and, therefore, is not in a position to complain of the action of the city in vacating a street, if, in the exercise of its right, the city has not destroyed his private right to reasonable ingress and egress. The destruction of a right which is common to the general public does not invest an abutting property owner with any ground of complaint. As long as his right to ingress and egress is maintained,—that is, his private right,—he has no ground of complaint. The right of the individual must give way to the larger right of the public, though it has been recognized, in the last case cited, that the property owner's right is not entirely subordinated to the public right or the public interest. The right which the property owner acquires is the right of ingress and egress to and from his property. All other rights enjoyed by him are held by him in common with the public. This field has been covered so frequently and so fully in the cases hereinbefore cited that we need not enter into any elaboration upon this, but turn our attention to those matters which are urged here against the right of the defendant to do the thing complained of.

The first contention of plaintiff is that the street was never legally vacated. This contention rests on the fact that Ramsey, at the time the city council acted, was a member of the council, and voted for the vaca-

tion. It is contended that this had the effect of destroying the legal efficacy of the act of vacation.

2. MUNICIPAL CORPORATIONS: proceedings of council: councilman interested in result.

It will be noted that, upon the vacation, the property reverted, not to Ramsey, but to the city. In fact, the legal title did not revert to the city, because it was already vested with the legal title. The effect of the vacation was to unburden the legal title of the easement in the public. If nothing further appeared, Ramsey did not have a personal and present interest in the act of vacation, or in the fruits of the act. But the record discloses that, prior to any action taken by the city council to vacate this road, Ramsey had entered into an oral understanding with the town that, if they would vacate this north and south road and turn it back to him, he would turn over another road to the county; that Ramsey agreed to this; and that thereafter the action was taken to vacate the road.

One Tracy testified that he was clerk of the town of Portsmouth, and had possession of the records; that he was present at one meeting when the question of crossing Ramsey's land was discussed and talked over. He says, in substance:

"There was a petition handed me from the farmers west of Portsmouth, a petition to change the road. This petition was read to the council. Mr. Ramsey was there, and the subject was brought up for discussion. They talked it back and forth. Mr. Ramsey wanted to know what they would do, and they made an arrangement with him that they would vacate this piece of land [the north and south road in controversy] and give it back to him, if he would give them a road through the way these farmers

wanted. Ramsey was not to charge them anything for the land for this new road, if they would vacate the road in controversy, and deed it to him. He didn't want the old road through there, if he had to give another road running around the other side. The new road was then agreed upon, on condition that the old road be vacated."

Section 683 of the Code was then in force, and provided that, in towns, by-laws, ordinances, and the resolutions and orders shall require for their passage or adoption a concurrence of four councilmen, or of three councilmen and the mayor. At the meeting at which the ordinance passed, vacating, there were present the mayor and four councilmen. Among these councilmen was defendant, Ramsey. He voted for it. The record shows that there were five members of the council at the time: Ramsey, Bendon, Henley, Doyle, and Rosenthal. Rosenthal was not at the meeting. The ordinance provided for the vacation of this 66-foot road in controversy, and the ordinance vacating the road was passed by the concurring vote of Ramsey, with three others of the council. Without Ramsey's vote, the ordinance would not have passed, and the road would not have been vacated. It would stand as originally created by the act of the Milwaukee Land Company—a public road deeded to the city for a public highway. Ramsey had a special interest in having this vacated. It was all on his land. The ordinance was passed by Ramsey's vote, with the understanding that the land covered by the vacated road would subsequently become his, through the action of the council. He came within the inhibition of that rule found in Section 668 of the Code of 1897, Subdivision 14, which provides that:

"No member of any council shall, during the time for which he has been elected, * * * be interested, directly or indirectly, in any contract or job for work, or the

profits thereof, or services to be performed for the corporation."

In *Bay v. Davidson*, 133 Iowa 688, 690, this court held that the purpose of this statute was to prevent councilmen, directly or indirectly, from making profit out of their relationship with the city. Such contracts are void at common law, and this court has repeatedly refused to enforce them. Defendant is relying upon this ordinance to justify his act in closing up the highway. If this ordinance is void, he has no justification, and we think he had none under the authority of *Bay v. Davidson*, supra, and *James v. City of Hamburg*, 174 Iowa 301. This ordinance could not have passed without the vote of Ramsey. Ramsey was interested in having it pass. Its passage gave him this strip of land, covered by this road, or, at least, it was his understanding and agreement that, upon the passage of the ordinance vacating this road, the town would deed this land to him; and it did. We must hold the effort at vacation, therefore, void.

It is contended, however, that plaintiff cannot raise this question; that the only method of raising it is by certiorari. Certiorari would not bring the relief which plaintiff seeks in this suit. All he asks is that this defendant be enjoined from obstructing a public highway, properly and legally created, and industriously used by the public as a highway for many years. Equity takes cognizance of the rights here involved, and will give the relief prayed for. The ordinance only becomes defensive, and, being void, serves as no defense.

The ordinance being void, under which the defendant seeks to justify his act in obstructing this highway, we think the court erred in dismissing plaintiff's petition. It

3. CERTIORARI:
existence of
other remedy.

4. **INJUNCTION:**
void vacation
of street.

will be borne in mind that this proceeding is against a private citizen, who is charged with violating the statute prohibiting the obstruction of a public highway. Anyone whose private rights are invaded by the act of obstruction may maintain an action to enjoin the continuance of the wrong. That plaintiff had an interest is made manifest by the fact that this road was one of the avenues open to him for travel to and from his premises. In one sense, his land does not abut upon the public highway, but the public highway leads to his land from the main traveled road to the south, and the record shows it is necessary for his use in traveling to the county seat of the county, and to other market places within his vicinity. His private right has been invaded. He is, therefore, a proper party to maintain the action.

Upon the whole record, we think the court erred in dismissing plaintiff's petition; that, under the record made, the plaintiff was entitled to the relief that was denied him. The case is, therefore,—*Reversed*.

LADD, C. J., WEAVER and STEVENS, JJ., concur.

HENNING M. SCHMIDT, Appellant, v. TOWN OF BATTLE CREEK
et al., Appellees.

HIGHWAYS: Dedication—Strict Limitation. The public rights in
1 a dedicated highway will be strictly confined to the limits of the
dedication, as clearly marked out and designated by the visible
monuments erected by the dedicator.

HIGHWAYS: Consent Roads—Failure to Secure Consent of All
2 **Owners.** Principle recognized that the establishment of a *con-*
sent road, without the consent of *all* the owners affected, is a
nullity. (Sec. 1512, Code, 1897.)

Appeal from Ida District Court.—M. E. HUTCHISON,
Judge.

DECEMBER 16, 1919.

REHEARING DENIED MARCH 17, 1920.

ACTION to enjoin the defendants from moving plaintiff's fence back along a public highway. Decree dismissing plaintiff's petition. Plaintiff appeals.—*Reversed*.

Snell Bros., for appellant.

Chas. S. Macomber and Campbell & Campbell, for appellees.

GAYNOR, J.—This case involves a dispute over the territorial limitations of certain public highways. The action is to enjoin the town of Battle Creek and the city and county officers from widening the highways by setting back the fences that now and heretofore have marked these boundaries.

1. HIGHWAYS:
dedication:
strict limitation.

One of the highways runs east and west through the center of Section 27, and the other along the south line of 27. These highways, as they now exist and as they have been used for the last 25 years, are not 66 feet wide. It is the claim of the defendants that they are and should be 66 feet wide, or 33 feet on each side of the section line. Defendants base this claim on the alleged fact that there were consent highways established by the board of supervisors on these lines on or about the year 1876, and that the statute fixed the width of a highway at 66 feet.

The record shows that, at that time, one Wagoner owned the south half of Section 27; that a man by the name of Teal owned the northeast quarter of 27 and the

2. HIGHWAYS: ~~consent of~~ ~~failure to~~ ~~secure consent~~ ~~of all owners.~~ ~~the~~ ~~company~~ owned the southwest quarter of the northwest quarter. There is no showing in this record as to the ownership of the land in 34, immediately south of 27, abutting on that south road. The only evidence of any consent to the establishment of either as a highway is found in two papers filed by Wagoner on July 5, 1876, reading as follows:

"To Honorable Board of Supervisors of Ida County,
Iowa:

"This is to certify that I consent to the location of a public highway along the north line of the south half of Section 27, Township 87, Range 41, and on the line of the south half of the northwest quarter of said section."

"To Honorable Board of Supervisors of Ida County,
Iowa:

"This is to certify that I consent to the location of a public highway along the north line of the south half of Section 27, etc., and on the south line of the south half of the northwest quarter of 27."

The consent of no other property owners appears to have been filed, nor is it claimed that any other or further consent was given. It is claimed that, on this consent, the board of supervisors established a road through the center of Section 27, 66 feet wide, 33 feet on either side of the half section line, and another road 66 feet wide on the south line of Section 27, between 27 and 34, 66 feet wide.

At that time, the only law authorizing the establishment of a public highway by consent was found in the Code of 1873, Section 957, which reads as follows:

"Highways may be established without the appointment of a commissioner, provided the written consent of *all the owners* of the land to be used for that purpose be first filed in the auditor's office; and if it is shown to the

satisfaction of the board of supervisors, that the proposed highway is of sufficient public importance, to be opened and worked by the public, they shall make an order establishing the same, from which time only shall it be regarded as a highway."

It is apparent, therefore, that the consent required by this statute to authorize the board to legally establish highways on these lines was not given. No highway could be established that would have the effect of taking any of the land owned by the nonconsenting owners. But roads were opened along both these lines, and the record discloses that they were opened in this way: Wagoner was a surveyor, and, after the filing of his consent, he undertook to survey his land, both on the north and on the south, for the purpose of ascertaining the section and half-section lines. At that time, he found what he believed to be the government corners, and made his survey accordingly, and staked off a portion of his land, to be used as a public highway. His land was all south of the half-section line of 27. On the half-section line, he made measurements indicating the portion of his land to be devoted to public use. He drove stakes. He built a hedge, marking the south line of the land so dedicated to public use. This hedge subsequently died. Thereafter, he placed cottonwood trees and a fence along this line, indicating the south line of the highway which he proposed dedicating to public use. This was more than 25 years ago,—the exact date is not material. Without objection from the owners on the north, the road was opened and used, and a part of the land of these northern owners was appropriated to this public highway. It appears that Teal was there, at the time plaintiff made his survey, and staked the road. Teal's presence, without objection, would indicate that he consented to what Wagoner did. That road, as laid out by Wagoner, has remained there for all these years, and is still there, undisturbed, and

used by the public as a highway, within the limitations fixed by Wagoner. Both on the north and on the south of this half-section road, as laid out by Wagoner, each party has constructed fences, and tilled up to that line. The public has never, during all these years, asserted any right to use any land found outside of the line so marked and indicated by fences, trees, and hedges.

The same is practically true of the south road, except that it does not appear who are the owners of the land in Section 34, south of the south road; but the road was opened there as on the north. The lines were staked off, and visible monuments placed, indicating the north and south boundaries of the road. It has been used and traveled by the public, within the limits of these boundaries, for 25 years, at least. No claim was ever made by the public until this time, that any rights exist in the public beyond the limitations marked. It is now proposed to move the half-section road south on plaintiff's land, and the south road north; and this on the ground that a recent survey shows the half-section line to be south of where it was thought to be by Wagoner, when he made his survey, and that the south section line is north of where it was supposed to be when Wagoner laid out the south road.

We are not concerned now to inquire into the correctness of these surveys. Whatever right the public has in either of these highways must come through a dedication of right to the public by the acts of the then owners, and the acquiescence in their acts by their subsequent grantees. The public right has its territorial limitations within the bounds of the territory dedicated. So far as the public or these defendants are concerned, their rights must be found either in prescription or dedication.

It will be noted that, in the Wagoner consent, no width of road is given, nor does it appear that any action of the board of supervisors fixed a definite width of road. It does

not appear that the public officials worked either of these roads during these years. The most we find in this record is that, after they were opened,—staked off, rather,—marked off by metes and bounds by Wagoner,—the public has then used them as public highways for all these years, but within the limits of the boundaries so fixed. Plaintiff is not disputing the public's right to use so much of the highways as was thus dedicated and used. His objection goes to the right of defendants to take more of his land than was thus dedicated to the public use.

Dedication involves the idea of giving certain specific lands to the public for public use, or a certain right or easement in land for a specific public purpose. Common-law dedications are divided into two classes, expressed and implied. In either, however, it is necessary and essential that there be a surrender or an appropriation of the land by the owner to the public use. An expressed dedication is evidenced by some explicit or positive act or declaration, such as manifests an intent to surrender the land to the use of the public. An implied dedication is evidenced by some act or course of conduct on the part of the owner from which a reasonable inference of intent to dedicate can be drawn. There must be an intent to dedicate, and, without the intent, shown in some way, there can be no valid dedication. The intent is, however, not sufficient. While the intent must exist, to make the dedication, yet there must be actual setting aside of the physical property to the public use, accompanied by the intent that it shall be so used. There must be a parting with the use of the property to the public, made *in praesenti*, manifested by some unequivocal act indicating clearly an intent that it be so devoted. The extent of the dedication, its scope and character, depend upon the intention of the dedicator, as manifested in the act of dedication, and the right of the public is limited to the physical property so set aside for the public use.

The public is not bound to accept dedication, though expressly dedicated to its use. An offer to dedicate does not become complete until there is an actual acceptance by those to whom the offer is made. The intent to dedicate, followed by a manifest purpose to expose the property to public use, when accepted by the public, becomes final; and the right of the public is limited territorially to the property dedicated and accepted by the public.

Here, we have evidence of a manifest purpose on the part of Wagoner to dedicate land for a road. He expressed his purpose in the consent filed with the board of supervisors. This was followed by such conduct on the part of Wagoner as indicated his purpose to dedicate, and the thing to which the dedication should apply, with its territorial limits. He created the territorial limits, and the public accepted the dedication within these limitations. So, as to Wagoner, there was a complete dedication to the public use of a highway within the limits marked out by him at the time he made his survey and planted his hedges and subsequently his trees and fences, all of which were placed upon the line staked out and marked by him as a southern boundary of the land dedicated to public use. These lines and boundaries have remained ever since. The public accepted its right within these boundaries, and has exercised its right within these boundaries.

We are not concerned to inquire what, if any, rights the public secured in the land north of the half-section line. These parties are not before the court, and there is no evidence of any dedication on their part; but a prescriptive right might well be urged against them, to the extent of the lands included within the highway, as used by the public during all these years.

We are not concerned to inquire what, if any, rights the public secured in land south of the south section line. These parties, too, are not before the court, and there is no

evidence of any dedication on their part; but, as to them, too, a prescriptive right might well be urged against them, to the extent of the lands included within the highway as used by the public during all these years.

No legal highway having been established, the public right in these roads is limited to land acquired either by dedication or prescription, and their rights are bounded by the territorial limitations placed upon the use by the owners. A prescriptive right cannot be acquired to any property that has not been actually used by the public for the prescriptive period. Prescription acquires for a party precisely what he has possessed, and nothing more; and, in proving prescription, the user of the right is the only evidence of the extent to which it has been acquired.

The defendants seem to make some claim, resting on a petition filed by certain landowners in July, 1871, whose land bordered upon this highway. This petition prayed that a commissioner be appointed, to view and report upon the expediency of changing the Ida Grove and Woodbury County road, where the same passes through Sections 18 and 19-87-40 and Sections 23, 25, 27, 28, 33, 32-87-41. Notice seems to have been given of the filing of this petition. A plat, with the following notations, was introduced, "Map of survey of changes in sections," reciting the sections aforesaid. Notice was given that the petition would be presented to the board at their August meeting in 1871, asking for the appointment of a commissioner to examine and make certain changes in the Ida Grove and Woodbury County line road, where said road passes through the sections aforesaid. At the August meeting, J. J. Graves was appointed commissioner to act in the above petition, the commissioner to commence his work on the 29th day of August, 1871, and to report before the 4th day of September. The commissioner reported in favor of the change as prayed, and November 4th was fixed as the day for final

hearing. The record then discloses that, on November 4th, the board made the following record:

"And now, this being the day fixed as the day for final hearing upon the above-described road, to wit, the Ida Grove and Woodbury County Line Road, and there being no objections made to the change in said road as petitioned for, the commissioner having recommended said changes and caused the same to be surveyed and staked out, it is, therefore, ordered and adjudged by the auditor that said changes be considered made and established, subject to the approval of the board."

On the margin of this was noted:

"Plat made on paper and filed with the petition and commission. See field notes of original survey of this road."

The board thereupon made the following entry:

"And it appearing that legal notice of final hearing and no objections thereto or claim for damages having been filed, it is ordered that said road be relocated as platted by the commissioner, and the auditor is ordered to plat and record the same."

There is nothing in this record that indicates, with any degree of certainty, that these roads were involved in this action taken by the board of supervisors. The petition prayed for the appointment of a commissioner to examine and make certain changes in the Ida Grove and Woodbury County line road, where said road passes through these sections, but it does not indicate that these roads were a part of the Ida Grove and Woodbury County line road. Indeed, we infer that they were not, and for this reason, the record shows that, after the board assumed to act upon Wagoner's consent, this petition was filed and acted on. It was after this that Wagoner opened the road on these disputed lines, and staked off the territorial limitations of the road by placing hedges, fences, and trees along the line. There is

nothing, therefore, in this record to sustain defendants' contention that there was a legally established highway along the lines in dispute, other than as established by the act of Wagoner, as hereinbefore recited.

Upon the whole record, we think the court erred in refusing to grant plaintiff the injunction prayed for, and its judgment is, therefore,—*Reversed*.

LADD, C. J., WEAVER and STEVENS, JJ., concur.

ANNICE STUKAS, Administratrix, Appellee, v. WARFIELD-PRATT-HOWELL COMPANY, Appellant.

EVIDENCE: *Res Gestae*—Test for Admission. The test whether
1 declarations are *res gestae* is: Were the facts talking through
the party, or the party talking about the facts? Instinctiveness
—spontaneity—is the ever-present requisite. Precise coincidence
in point of time is not necessarily requisite.

TRIAL: *Conflicting Res Gestae*—Effect. Evidence which is part
2 of the *res gestae* may stand in the record for what it is worth,
even though, after its introduction, the opposite party introduces
res gestae which are prior in time to the first, and inconsistent
therewith.

NEGLIGENCE: *Elevator Accident*. Evidence reviewed, and held
3 sufficient to sustain a verdict for negligence in the operation
of a freight elevator.

NEGLIGENCE: *No Eyewitness Rule*. Principle recognized that,
4 in the absence of any eyewitness to an accident, the law will
presume due care.

Appeal from Woodbury District Court.—J. W. ANDERSON,
Judge.

DECEMBER 13, 1919.

REHEARING DENIED MARCH 17, 1920.

ACTION at law to recover damages on account of the death of George Stukas, who was fatally injured in an elevator accident in a building owned by the defendant in Sioux City, Iowa. There was a verdict and judgment for the plaintiff, and defendant appeals.—*Affirmed.*

C. Woodbridge, E. M. Corbett, and Sears & Snyder, for appellant.

E. G. Smith and Jepson & Struble, for appellee.

WEAVER, J.—The defendant was the owner and occupant of a six-story building in Sioux City. In this building, defendant installed and was operating two elevators, mainly used for the handling and moving of freight. They were not intended for use as ordinary passenger elevators, but were, in fact, to some extent, used by employees and workmen in passing from one floor to another, in the course of their employment. On October 20, 1917, one Sulzbach, a contractor, was engaged in making extensive changes and repairs in the interior of the building, and among the employees of Sulzbach in that service was George Stukas. The plan of improvements being made in the building required the cutting of openings through the several floors, and this part of the carpenter work was being done or directed by Stukas. He had worked there several weeks, and, with others of the workmen, made frequent use of the elevators, not only to be carried from one floor to another, but for carrying the necessary tools and materials for their use. An employee of the defendant operated the elevator, which was equipped with automatic gates or guards. They were so contrived that, at the basement and the sixth floor, the gates would open at the approach of the elevator and close with its departure. At the intermediate floors, the gates did not automatically open and close, except when it was

1. EVIDENCE: *res gestae*: test for admission.

desired to stop at such floor; and in such case, a pull upon a rope used for that purpose would bring into operation a clutch by which the gate was lifted. If left open, however, all the gates would close automatically, with the downward movement of the cage.

That the deceased was injured in the elevator is not denied. There was no eyewitness of the accident, and no one, so far as is known, saw him enter the elevator, or is able to describe the manner or method of his entrance into the cage. He was seen on the fifth floor, going in the direction of the elevator, very shortly before the outcry following his injury was heard. When the alarm was given, a witness at work near the elevator on the sixth floor ran to the shaft, where he found the cage lifted nearly to the level of that floor. The deceased lay with his face down upon the cage floor, while one of his legs was caught between the "header," or the edge of the opening into the shaft, and the floor of the cage, in such shape as to indicate that he had been lifted from the floor below, and that, in the upward movement of the cage, his leg had been, in some manner, drawn into the narrow space between the elevator and the opening through which it operates, crushing and mangling the limb. Subsequent examination also disclosed extensive injuries to the pelvic bones and internal structure of the lower part of his body. An ambulance was quickly summoned, and the unfortunate man removed to a hospital, where, within a few hours, he died.

The plaintiff, as administrator of his estate, charges that the injury and death of the deceased were the proximate result of the defendant's negligence.

Of the several specifications of negligence, the court submitted to the jury only the plaintiff's allegation that the servants and employees of the defendant carelessly and negligently set the elevator in motion, as deceased was entering or about to enter the cage. The defendant denies

generally the allegations of negligence, and alleges that deceased was well acquainted with the elevator and its construction and management, and assumed the risk of injury received by him in its use. At the close of the evidence, defendant moved for a directed verdict in its favor, because of the insufficiency of the evidence to support a recovery of damages. The motion was denied, and the issues submitted to the jury, which returned a verdict in plaintiff's favor for \$5,000, and judgment was entered accordingly. A motion to set aside the judgment and verdict and for a new trial having been overruled, the defendant appeals.

I. Before taking up specifically the points pressed upon our attention in the appellant's argument, it is well to make brief reference to some of the testimony elicited in the trial. For the plaintiff, it is shown that one Hanson, an employee of Sulzbach's, was at work on the sixth floor, about 25 or 30 feet from the elevator, when his attention was attracted by the sound of a fall and a cry from some person, and, running to the elevator, he found it and the injured in the position we have already described; and, with the help of others, the deceased was released from the cage, and very soon removed to the hospital. This witness had seen the deceased on the sixth floor, going in the direction of the stairway, about ten minutes before the accident. The injured man seemed to be conscious, but the witness had no talk with him. The elevator was in frequent use, and was ordinarily in charge of an operator. From the time the witness discovered the deceased in the cage of the elevator until he was removed to the ambulance, about 10 or 15 minutes elapsed. Responding to the call for the ambulance, two witnesses, Hennesy and Meis arrived. Hennesy says it was a "hurry-up call," and they went immediately to the building, and "loaded the man in the ambulance and beat it for the hospital." Describing the condition of the deceased at that time, he says:

"His face was all purple; his eyes were kind of bulged out of his head and real bloodshot. He was conscious. From the time we got the call until we got into the hospital was about 20 minutes. When we got to the hospital, we put him on the elevator, and took him up to the operating room immediately. When we took him out of the ambulance, he said the 'son of a bitch' wouldn't stop the elevator when he hollered. * * * I did not ask him anything about the accident when he said that. I don't know who he was talking about. I am giving just what he said. He did not mention any names. I don't know how he came to make the statement. I did not hear him say anything else. Nobody was asking him any questions or talking to him about the matter at all when he made the statement. I think he was conscious, from the way he talked."

The witness Meis tells substantially the same story. Says that Hennessy and he went quickly, upon receiving the call, and estimates the time from the call until they arrived with the deceased at the hospital at between 15 and 20 minutes, though he says it might have been between 20 and 25 minutes, and might have been less than 20 minutes. He also corroborates Hennessy as to the statement by the deceased that "the 'son of a bitch' wouldn't stop the elevator when he hollered." On cross-examination, he says the only other words he heard spoken by deceased were, as they were taking him up in the elevator at the hospital, he said: "Look out for the elevator, boys. Look out for the elevator." The witness adds, "I cannot say whether he was conscious or unconscious."

While the deceased was being removed from defendant's building, news of his injury was telephoned to his wife, with word that he was being taken to the hospital, where she at once went, arriving, according to her evidence, in not more than 20 minutes. On her arrival, she went at once to the operating room. She swears that her husband

there told her "he had been caught in the elevator," that he "got his foot caught in the elevator, and he called to the elevator man to stop, and he kept right on. He did not say how he got his foot caught. He said he called to the elevator man to stop, and he was too frightened or did not know enough to stop." The wife also describes the physical appearance of her injured husband substantially as do the other witnesses above mentioned. On cross-examination, the witness says that:

"On three or four occasions, her husband had 'spells,' when he was weak or faint, and on such occasions, he laid down, about half or three quarters of an hour. He was never unconscious. Would lay down, sort of helpless."

A sister of the deceased's, Mrs. Snell, living, at the time, in the same city, who also received a telephone message that Stukas was injured, and being taken to the hospital, testifies that, within 20 minutes, she went to the hospital, and found her brother on the operating table. She says:

"I went up to my brother and laid my hand over his, and said to him, 'I am here, George;' and he said, 'Yes, I know you are here, Irene.' He said he had been hurt in the elevator at Warfield-Pratt-Howell Company's. He said that, as he was getting in the elevator, they started the elevator, and he caught his foot, as he was getting in, and he could not help himself. He said he called to the elevator boy, and said: 'Stop, I am caught.' But he said the boy seemed to be so frightened he could do nothing, and he got off the elevator and left him alone."

It should also be said that the testimony of Hennesy, Meis, Mrs. Snell, and Mrs. Stukas, relating to alleged statements of the deceased concerning the cause and manner of his injury, was all objected to as incompetent, and not admissible as any part of the *res gestae*.

As the physical condition of the deceased from the

time of his injury until his death, some three or four hours later, had a material bearing upon some features of this case, we also quote from the testimony of the surgeon who attended him. He says:

"Mentally, he was apparently in very good shape. He was very blue from about the middle of his chest up and over his face. He was apparently in extreme shock, and for this reason perhaps was not suffering as much as he otherwise would, because his injuries developed to be of the most serious character. * * * From the blueness over his chest and face, I took it he had been very badly squeezed, forcing the air and blood into the upper part of his body,—especially the blood; and small hemorrhages out underneath the skin of the face would indicate that condition. I found very extensive damage to the pelvis and pelvic bones. The pelvic bones are the large bones to which the thigh is joined; and in this accident, these large bones at the side, ordinarily known as hip bones, had been torn apart. Especially was this true in the front part of the body. It was possible to pass my hand from the place where they were joined onto the trunk up inside of his body, 6 or 8 inches up around his bladder. His rectum was torn through, and the urethra ruptured; and on either side, between the thighs and trunk, one could go up on the inside of the abdomen, 6 or 8 inches. This meant, of course, other large wounds, and very extensive hemorrhage. I would not say there were bones broken."

The deceased was shown to be an experienced and competent carpenter, employed as a foreman, and was earning about \$140 per month.

On part of the defendant, it was shown that Lewis, an employee of the defendant's, was at work on the fourth floor. He testifies that Stukas had been on that floor, about 15 minutes before the accident, and then "went up to the sixth floor." The man operating the elevator on that day

was one Conway. Speaking of him, Lewis says:

"I saw Conway, immediately before the accident. He stopped the elevator on the fourth floor. I was about 15 feet from the elevator when he stopped. He got off and went south about 30 feet into a labeling room there. The elevator was then standing just right on the fourth floor. The accident happened just about a minute after that. My attention was attracted to the accident, because I heard the man holler. I was about 15 feet from the elevator. I got there as quick as I could, and looked up, and saw him caught. The elevator was on the sixth floor. I saw his left leg. As I stepped away from the elevator, Conway came from the labeling room to the elevator at the fourth floor."

The witness then went up the stairs to the sixth floor, and says that Conway reached that floor very shortly after—thinks not 20 seconds behind. He further says that, after reaching the sixth floor, he stepped in upon the elevator platform, and says that, after Stukas was released, and they were taking him below in the elevator:

"I asked him who took the elevator, and he said, 'I did.' I says, 'How did this happen?' He said, 'I stumbled and fell.' * * * I asked him again, on the way down, how it happened, and he said the same thing."

Conway, as a witness, says he was operating the elevator on that day, and, just before the accident, he spotted the elevator at the fourth floor, and went to the labeling room. Does not think he had been gone more than a minute; and, as he came out of the labeling room, he heard a scream, and, running to the elevator, saw Lewis going down the hall toward the stairway. Another unidentified person informed witness that a man had been caught on the sixth floor. Going up to that floor, he found four other persons already there: Lewis, Manske, and two carpenters. Nobody was then in the elevator with Stukas. Witness and others helped release him, and then took him below in the

elevator. He had seen Stukas before on that day, and, on that same afternoon, Stukas rode up in the elevator with him. Saw him again on the fifth floor, about 15 minutes before the accident. Witness further says it was practicable for a person on either floor to reach into the shaft and pull the cable which set the machinery in motion and bring the elevator to that floor; and that, on at least one occasion, on a Sunday, he saw Stukas enter the elevator on the first floor, and operate the lift up to the sixth floor—a thing to which the witness objected, told Stukas he must not do it, and that, when he wanted anything of that kind, he should call upon him.

One Schubert, a fifth floor man, was working some 40 feet from the elevator when Stukas came along, stopped momentarily, and went on in the direction of the elevator. Very soon thereafter, witness heard a moan, and, looking toward the elevator, saw a person's leg hanging down; and witness ran to the place, and shouted down the shaft for help. He then saw Conway thrust his head up from the fourth floor.

Manske was a sixth floor man. Saw Stukas on that floor, about seven minutes before he was hurt. Stukas said he was going down to the fifth floor and witness walked with him past the elevator to the stairway, which he descended. Witness heard the outcry twice, before he comprehended its significance, and, going to the elevator, saw Stukas in the position already described. Hanson and a carpenter were already there, and Lewis and Conway also soon appeared.

Sulzbach, testifying for the defendant, says that he went to the hospital where Stukas was taken, and while there, talked with the plaintiff's witness, Mrs. Snell, and that she told him Stukas had said to her that he had had one of his spells, and he could not help himself, and fell,

and that then he knew it was all over with him. This is denied by Mrs. Snell.

The foregoing, while not a complete *résumé* of the testimony, is sufficiently full to make clear the points to which the arguments of counsel are directed.

II. The first three propositions discussed on part of appellant may be considered together, as all of them go to the question of the competency and effect of the testimony admitted on part of the plaintiff, showing alleged statements by the deceased as to the cause of his injury. Referring to the first statement of this nature, which is said to have been made to the ambulance men who took the deceased from the place of the accident, to the effect that "the 'son of a bitch' would not stop the elevator when he hollered," it is objected that this was not an exclamation made as part of the occurrence, at or near the time of the accident, but was made after a considerable period of time elapsed, and was the mere narration of matters which were then in the past.

The same objection, but with added emphasis, is made to the testimony of the wife and sister, concerning the deceased's statements to them that he had caught his foot in the elevator, but the elevator man wouldn't stop, or was too frightened, or didn't know enough to stop; and that he caught his foot, as he was getting in the elevator, and, although he told the operator to stop, he didn't do it, but went away, leaving deceased alone.

The rule governing the admission of testimony of this nature varies but little in abstract statement by the courts generally, but there is quite a wide variance in the liberality of its application to concrete cases in different jurisdictions. It would be unprofitable to extend this opinion in an attempt to reconcile or explain any seeming inconsistencies in the precedents with which the books abound, as the views to which this court adheres have already been well

defined in our own decisions. *State v. Jones*, 64 Iowa 349, 353; *Keyes v. City of Cedar Falls*, 107 Iowa 509; *Alsever v. Minneapolis & St. L. R. Co.*, 115 Iowa 338; *Rothrock v. City of Cedar Rapids*, 128 Iowa 252; *Christopherson v. Chicago, M. & St. P. R. Co.*, 135 Iowa 409, 417; *Westcott v. Waterloo, C. F. & N. R. Co.*, 173 Iowa 355; *Dubois v. Luthmers*, 147 Iowa 315; *Peterson v. Phillips Coal Co.*, 175 Iowa 223, 228; *Vernon v. Iowa S. T. M. Assn.*, 158 Iowa 597, 600.

An examination of these cases demonstrates that this court is not in harmony with the extreme view entertained by some authorities, that, to be admissible as *res gestae*, the statements offered in evidence must have been spoken at the very time of the injury, or so near thereto as to be practically concurrent with the accident itself. As said by us in the *Dubois* case, *supra*:

"The time element, while important, is not controlling, under all circumstances."

We have repeatedly said that the proper test of admissibility of such statements "is whether they relate to the principal transaction and are explanatory of it, and are made under such circumstances of excitement, still continuing, as to show that they are spontaneous, and not the result of deliberation or design. * * * Within this general rule, the admissibility of the declarations under the circumstances of the particular case is largely within the discretion of the trial judge. The facts and circumstances of no two cases can be precisely alike, and the exact length of time is not mathematically controlling." See *Christopherson* case, *supra*; and this idea is, in substance, restated in the *Westcott* case, *supra*, which is relied upon by the appellant. Under that rule we have recognized as *res gestae* the statements of an injured person, concerning the cause and circumstances of his injury, made at more or less considerable intervals after the occurrence. In the *Rothrock* case, *supra*, the interval was about a half hour; in

the *Christopherson* case, *supra*, three quarters of an hour; in the *Keyes* case, an indefinite time, concerning which there was no proof except the plaintiff's own story.

So, in other jurisdictions, it has been held admissible to show as *res gestae* statements made fifteen minutes after the injury (*State v. Harris*, 45 La. 842, 844); the next day (*Lambright v. State*, 34 Fla. 564, 582); a half hour (*Augusta Factory v. Barnes*, 72 Ga. 218, 227); "some hours" (*Harriman v. Stowe*, 57 Mo. 93, 96); an hour (*Johnson v. State*, 8 Wyo. 494).

In *Insurance Company v. Mosley*, 8 Wall. 397, the Supreme Court of the United States says, of the *res gestae* rule, that:

"The tendency of recent adjudications is to extend, rather than to narrow, the scope of the doctrine. Rightly guarded in its practical application, there is no principle in the law of evidence more safe in its results. There is none which rests on a more solid basis of reason and authority."

It seems to be well settled in this state, as well as in many others, that there is no hard and fast rule, fixing with certainty the length of time beyond which the court may say, as a matter of law, that a statement made or act done is not a part of the *res gestae*. If the circumstances attending the injury, its nature and extent, the physical and mental condition of the person during the interim between his injury, and the statements offered in evidence, and all other proved facts by which the very truth of the situation may be tested, fairly indicate that such statements were the natural and spontaneous exclamations or declarations of the man, while still racked by the excitement, pain, and suffering from his mortal hurt, all the reasonable tests of admissibility are satisfied, although a few minutes, or even a longer time, elapsed between the crushing of his body and his declaration as to the cause of his misfortune.

On the other hand, if, from the showing made, it can reasonably be said that, before the statements were uttered, he had apparent time, opportunity, or disposition to reflect, and frame and give utterance to a falsehood, or, possibly, if it simply appear that his condition was such as to justify the reasonable belief that he could have indulged in such fabrication, then objection to the testimony should be sustained. It should be said at this point that the only item of the testimony relating to statements of the deceased and claimed to be admissible as *res gestae*, the admissibility of which may be open to doubt, is that which is given by the witness Mrs. Snell. The record does not disclose that any objection was made or exception preserved to such evidence, and it becomes unnecessary for us to pass upon the legal question which otherwise would arise. Brought to this test, we have no hesitation in saying that the trial court did not err in admitting the testimony offered by the plaintiff in this respect. The testimony being found competent, its weight and value are for the jury alone. This court cannot adopt the theory of counsel, that the fact that the deceased, when taken to the hospital and placed on the operating table, asked the surgeon to wait briefly until his wife could arrive, has any tendency to show a cunningly devised scheme on his part to get time to frame up a false account of his injury and communicate it to friendly witnesses.

That which we call human nature is not always nor altogether lovely, and it is barely possible that an occasional man may be found capable, under some circumstances, of pausing, with one foot over the threshold of eternity, to manufacture and give utterance to a deliberate lie; but that one in the condition of the deceased, with body horribly crushed, broken, and torn, undergoing inexpressible physical torture, calling upon the physician to administer something to relieve his suffering, and knowing, as he must have known, that he was looking into the face of death,

was, at the same time, craftily fabricating an untrue account of the manner and means of his misfortune, is too unreasonable to command belief, or, to say the least, is so manifestly improbable that its rejection by the jury is fully justified.

Not very unlike the case at bar in this respect is *Starr v. Aetna Life Ins. Co.*, (Wash.) 83 Pac. 113. The deceased, in that case, was discovered, very badly injured, and taken into a railway depot; and one Munger, living near by, was called. Munger took time to dress, before going to the station; and, after his arrival there, and about an hour from the time of the discovery of the injured man, the latter made a statement to Munger and a physician of the cause and manner of his injury; and died on the day following. In sustaining the admission of this statement in evidence, the court says:

"The ordinary rule is that a statement of this kind must have been made so recently that it would leave no room for collusion or premeditated self-serving. But no time can be arbitrarily fixed, it depending so largely upon the circumstances of each individual case."

Further discussing the question, the court said:

"In *Dixon v. Northern Pac. R. Co.*, 37 Wash. 310, we held that 15 minutes was not so long a time as would exclude the testimony; and in *Roberts v. Port Blakely Mill Co.*, 30 Wash. 25, we held that testimony given within three hours after a railroad accident could be admitted as *res gestae*. In this case, considering the facts that the man's associates had left him, that he was so mangled and crushed that an amputation of his arms was necessary, and that he died within 36 hours of the accident, it would be a violent presumption to indulge that the statement was made for a self-serving purpose; and we think that the refusal of the testimony under such circumstances would tend to work an injustice, by excluding testimony which would

have a tendency to throw light on a transaction which would otherwise be obscure, for want of evidence."

The simple truth seems to be that, from the time the deceased was caught and injured in the elevator, until his death, three or four hours later, he was, in fact, a dying man. His injury, his discovery in the elevator, his release therefrom, his removal down the elevator and into the ambulance, his being thence rushed to the hospital, and thence to the operating table, then the futile efforts of the surgeon, and the end of it all in death, were but the succession of intimately connected scenes, making up a single tragedy; and the story told by the deceased, if he did tell it, cannot be classed as a mere recitation of a past transaction.

For a very thorough discussion of the *res gestae* doctrine, see 3 Wigmore on Evidence, Sections 1745-1757; also, *Bulkeley v. Brotherhood Acc. Co.*, 91 Conn. 727; *Roach v. Great Northern R. Co.*, (Minn.) 158 N. W. 232.

III. The appellant argues that, even if the testimony showing statements of deceased to Hennesy, Meis, Mrs. Snell, and Mrs. Stukas was properly admitted when offered, it should still have been stricken.

2. TRIAL: con-
flicting *res*
gestae: effect. upon the motion made therefor by appellant, because appellant showed by its witness Lewis that, before the alleged statement to the plaintiff's witnesses, Stukas had said to Lewis that he himself took the elevator, and got caught because he stumbled and fell. It is hardly necessary to say that, if the plaintiff's evidence was properly admitted when offered (and we find it was), its retention in the record cannot be made erroneous by the fact that defendant thereafter put in evidence another alleged inconsistent statement, made a few minutes nearer the instant of the injury. The court cannot say, as a matter of law, that the story of the witness Lewis was true, and that, because thereof, the testimony of Hennesy, Meis, Mrs. Snell, and Mrs. Stukas

must be discarded. If the jury believed the former, we may assume it would have promptly returned a verdict for defendant. Its verdict for the plaintiff indicates, however, that it did not credit Lewis's testimony in this respect, and did credit that which was given by the other witnesses mentioned.

There was no error in denying the defendant's motion to strike the testimony.

IV. It is earnestly contended in appellant's behalf that, considering the evidence as a whole, it negatives the possibility that deceased was injured by the negligence of the operator in charge of the elevator.

It is to be admitted that, upon some of the material facts, the case is a close one—close, not so much from lack of evidence to support the verdict, as from the fact that impartial minds may readily differ upon the

3. NEGLIGENCE:
elevator acci-
dent.

weight and value of much of the testimony. This, however, was a problem for the solution of the jury; and, upon the record as made, we cannot assume to set aside its finding. Although witnesses say they saw Stukas on each of the three upper floors within a short time before the accident, and, when last seen, he was on the fifth floor, moving toward the elevator, and the witness on that floor says it was only a very short time, "a minute or so or less," before the cry of the injured man was heard, and although the witness on the fourth floor says that Conway had brought the elevator to that floor, and gone into the labeling room, 30 feet away, only a minute or so before the alarm, and the same witness says he saw Conway coming from the direction of the labeling room toward the elevator, "a minute or so after the accident happened," yet no witness is found or shown to exist who saw the deceased go to or enter the elevator, or interfere with it in any manner, or make any attempt to operate it; and no one except Conway himself professes

any knowledge of Conway's whereabouts, or what he was doing between the time when Lewis says he saw him go into the labeling room, "about a minute before the accident happened," and the time when the same witness saw him coming from that direction, "a minute or so later, after the accident."

Under these circumstances, it will be presumed that deceased was exercising reasonable care for his own safety, and there is no conclusive showing of other facts which

as a matter of law, rebuts that presumption. Counsel's statement in argument, as a proved fact, that, when Conway brought the elevator to the fourth floor, and went

to the labeling room, "Stukas, who was on the fifth floor, reached into the shaft, pulled the cable, and started the elevator up, and got caught" between the fifth and sixth floors, is not justified by the record. This, it is true, is the appellant's theory of the accident; but no witness testifies to its truth, and no one claims to have any personal knowledge of the facts so assumed. There is, of course, testimony which, so far as it goes, is consistent with counsel's theory; but, excepting the denials of Conway, the facts so relied upon are not necessarily inconsistent with plaintiff's theory.

The value of the testimony of Schubert, the fifth floor man, who says he saw Stukas going in the direction of the elevator, and of Lewis, who speaks of the movements of Conway, depends very largely, not only upon their credibility, but upon the accuracy of their memory and judgment concerning the time which elapsed before the alarm was given. It may be taken for granted that the time was comparatively short. The words "a minute," "about a minute," "a minute or less," "a minute or so," are among the commonest forms of expression for a "short time" or "short interval" or "brief period." As a rule, persons using them

4. NEGLIGENCE:
no eyewitness
rule.

are not attempting to "speak by the watch," and no one so understands them. And even if, by direct interrogation, the average person is asked to state his estimate of time between two more or less closely succeeding events to which his attention is not especially called until afterward, his answer of a "minute or so" or "an hour or so" may exceed or fall short of the actual interval to a very material degree. It should have been said that communication between the floors of defendant's building is not limited to the elevators, but a stairway very near the elevator affords means of quick passage from one floor to another. The passage of the elevators up and down the shaft, and of persons ascending and descending the stairs, must have been very commonplace matters, attracting little attention from the employees on the several floors. Schubert, on the fifth floor, was at work 40 feet from the elevator, and facing the other way. Lewis, on the fourth floor, was some 15 feet from the elevator, when Conway first appeared there. So far as appears, there was nothing special or unusual in the fact that Stukas passed Schubert's place of work, going west, or in the fact that Conway passed south to the labeling room in the sight of Lewis, to impress the circumstance particularly upon the mind of either witness, or lead him, at the time, to notice just how many seconds or minutes elapsed between such appearance and the outcry which afterwards startled them. All these things were proper matters for the jury to consider; and if therefrom, or from the demeanor of the witnesses on the stand, their apparent candor or lack of it, and from the reasonableness or unreasonableness of their respective stories, the jury found against the defendant's theory, it cannot be said that their verdict is without sufficient support in the testimony.

The fact, as pointed out by the appellant, that Mrs. Stukas and Mrs. Snell are interested witnesses, and that no other witness claims to have heard the alleged state-

ments to them by Stukas, is, of course, a legitimate argument to the jury; and we must presume that the jury did not overlook that element in the case. It may also be said that Lewis, who testifies to an alleged contradictory statement by Stukas, is in no manner corroborated by any of the four or more other persons who gathered about the injured man on the sixth floor, nor by Conway himself, who accompanied the deceased down the elevator to the ambulance. Moreover, it is to be said that the truth of the testimony of the women finds very material support in the testimony of the two ambulance men, who, so far as the record shows, are disinterested witnesses.

We find no reversible error in the case, and the judgment below is, therefore,—*Affirmed*.

LADD, C. J., GAYNOR and STEVENS, JJ., concur.

ALPHONSO HADLEY, Appellant, v. T. N. COFFIN, Appellee.

PARTNERSHIP: Wrongful Suit—Contribution. A partner who, subsequent to the dissolution of the partnership, is wrongfully sued in tort on a partnership transaction may not enforce contribution from his former partner for the expense attending such suit.

Appeal from Warren District Court.—LORIN N. HAYS,
Judge.

MARCH 23, 1920.

ACTION by one member of a firm to recover from his former partner contribution for expenses incurred in defending a suit against himself for fraud practiced in the sale of land for the firm. Demurrer to petition sustained. Petition dismissed. Plaintiff appeals.—*Affirmed*.

A. V. Proudfoot, for appellant.

Berry & Watson, for appellee.

GAYNOR, J.—Plaintiff alleges that, during the year 1911, and up to the 28th day of October, 1914, he and defendant were partners, engaged in the real estate business in Indianola, Iowa, under the firm name of Coffin & Hadley; that, in the spring of 1911, as agent for the owners, they exchanged with B. G. Clark a quarter section of land in Wyoming for Indianola, Iowa, property, and sold to J. W. Buckingham another quarter section in the same state. After these deals were completed, and after the partnership had been dissolved, the purchasers brought separate suits against him to recover damages on account of alleged false and fraudulent representations made as to the quality of the lands sold. In each of these suits he made a defense, and alleges that this defense was made in behalf of the partnership of Coffin & Hadley; that Coffin, as a member of the firm, participated in whatever false and fraudulent representations were made, and in all of the transactions leading up to the exchange and sale, and was equally active with the plaintiff in consummating the deals; that, in defending said suits, brought against him personally, he was compelled to employ counsel, and incur expense in so doing, and he has paid the same.

He brings this action to recover contribution from the defendant, his former partner, and demands judgment for one half of the attorney's fees so incurred in defending said suits; and states that both of said suits terminated in his favor.

The second count of the petition is substantially the same as the first count, except that it seeks to recover one half of the expenses necessarily incurred in going to Wyoming and securing testimony to be used in the defense of the suits aforesaid.

Defendant demurred to the several counts of plaintiff's petition, and this demurrer was sustained, and plaintiff's petition dismissed. Plaintiff appeals.

The only question here presented is: Did the court err in sustaining the demurrer? The demurrer was predicated on the thought that the expenses sought to be recovered were expenses incurred in an action against the plaintiff, individually, and that the defense was made in his own behalf, and not for this defendant, or for the firm of Coffin & Hadley, who were not sued, and were not made parties. Second, that this defendant had no legal interest in these suits; that, in the event judgment had been obtained against this plaintiff, this defendant could not have been required to contribute to the payment of the same, for the reason that the cause of action in each of said suits was based upon alleged tort, committed by the plaintiff knowingly, and was a tort of such a nature that contribution could not have been compelled, even between partners.

The case of *Clark v. Hadley*, referred to in the petition, came to this court, and is reported in 181 Iowa 487. This court affirmed the judgment of the court below in favor of Hadley.

The demurrer admits all the facts well pleaded, but not necessarily the conclusions of the pleader. The petition shows the following facts: Plaintiff and defendant entered into partnership in the year 1911, and continued until some time in October, 1914. While this partnership existed, they had certain lands in Wyoming for sale or trade. They sold or traded to Clark a certain portion of the land in Wyoming, and to Buckingham another portion. Before this deal was consummated, Hadley and Coffin both visited Wyoming, in company with Clark and Buckingham. The Wyoming lands were inspected and purchased through the firm. These deals were completed, and the commission paid to the firm. Thereafter, in December, 1915, and after the firm

had been dissolved, Clark and Buckingham each brought separate suits against this plaintiff, Hadley, individually, alleging that he made certain false and fraudulent representations touching the land. Recovery was sought in tort on account thereof. In those suits it was not alleged that the defendant, Coffin, made any of the false representations upon which the suit was predicated, nor was it alleged that he was party in any way to the fraud upon which the suits rested. These suits were both tried, and both terminated in favor of this plaintiff, and he was exonerated from any liability on account of the alleged fraud. In defending himself against those suits, plaintiff incurred the expense for which he now sues; and it is on account of the expense so incurred that he seeks contribution from this defendant. It will be noted that, when this transaction took place, out of which the Clark and Buckingham suits grew, the plaintiff and defendant were partners. It will be noted that the partnership had been dissolved, and they were no longer partners, at the time these suits were commenced. It will be noted that no claim was made there against this defendant, and it will be noted that no claim is now made that this defendant perpetrated any fraud on either Clark or Buckingham, nor was it affirmatively alleged in either of the cases that the fraud was practiced by the firm, or that this plaintiff was authorized by the firm to make any of the allegations upon which the fraud was predicated. The firm was not impleaded, and in no event could a judgment be entered against the firm, even had the plaintiffs in these suits been successful. It is not shown in this petition, or alleged, that defendant in this suit made any false or fraudulent representations for which he could be made personally liable in any suit brought by either Clark or Buckingham. The best that can be said for the petition is that plaintiff was active in consummating the deal with Clark and Buckingham. It affirmatively appears that nei-

ther the plaintiff nor the defendant practiced any fraud upon either Buckingham or Clark. It therefore appears that the plaintiff was wrongfully sued by Buckingham and Clark for a fraud that was never practiced by either the firm, Coffin, or Hadley. The verdict and judgment of the court in each of said cases determined conclusively that the fraud charged was not practiced on either Buckingham or Clark. There was, therefore, no tort committed, either jointly or otherwise. It appears that Hadley was unjustly charged with the commission of a tort—a tort which had not been committed by him. This unjust charge, however, called on Hadley for defense. The judgment in those cases finally and conclusively shows that the fraud charged had not been committed, for which either the firm, Coffin, or Hadley could be held responsible. The record simply presents a case in which one member of a firm, transacting business for the firm, was wrongfully charged with the commission of a tort, defends against the charge, and is acquitted. The theory upon which the acquittal rests is that no tort was committed. There was, therefore, no liability on the part of anyone. Further than that, liability for the tort, if one had been committed, was not sought in the action to be enforced against anyone but Hadley. It was charged as his independent tort, to which a personal liability attached. This case presents no grounds for assuming that it was a joint tort, or any tort for which either the firm or any member of the firm is liable. It presents, therefore, no basis for contribution.

The question here presented, we do not find has ever been passed upon by this court before.

Applying general principles to the facts herein stated, we hold that the court was right in sustaining the demurrer, and that the petition presented no cause of action against this defendant; and its action is, therefore.—*Affirmed*.

WEAVER, C. J., LADD and STEVENS, JJ., concur.

PERSINGER GARAGE COMPANY, Appellant, v. M. CAMINSKY,
Appellee.

CHATTEL MORTGAGES: Destruction of Note—Effect on Lien.

Whether a transaction constitutes a purchase or payment of a note is a matter of intention. Evidence reviewed, relative to the unauthorized destruction of a note by a surety and the execution of a new note by the principal debtor, and held to show a purchase, and not a cancellation, and that the chattel mortgage lien was, therefore, preserved.

Appeal from Des Moines Municipal Court.—J. E. MERRISON,
Judge.

MARCH 23, 1920.

SUIT in equity to determine priority of liens. Decree in favor of defendant. Plaintiff appeals.—*Affirmed.*

John L. Gillespie, for appellant.

E. S. Schuetz, for appellee.

STEVENS, J.—On or about April 8, 1919, plaintiff commenced an action against W. J. Roberts on an open account, aided by attachment which was levied upon a Ford automobile owned by said Roberts. A trial resulted in a judgment against Roberts. Shortly after the levy of the writ of attachment upon the automobile, defendant herein caused a proper notice to be served upon plaintiff, claiming a prior chattel mortgage lien upon the automobile. It appears without dispute in the record that, on or about January 6, 1919, W. J. Roberts borrowed \$150 from a bank in the city of Des Moines, giving his note therefor, due March 6, 1919. The note was also signed by R. A. Greene, as surety. On the same day, Roberts gave a chattel mortgage on the Ford automobile to Greene, to protect him in case he was required to pay the note. On March 1, 1919, Greene assigned

the mortgage in writing to J. W. Mulhern, who paid the bank and took up the note. On April 7th, Mulhern and E. S. Schuetz went to the office of R. A. Greene, where the papers were kept for Mulhern, at which time a check, signed by defendant, for \$150, was delivered by Schuetz to Mulhern, who in writing assigned the mortgage to defendant. After assigning the mortgage to defendant, Mulhern handed the note to Greene, who destroyed it, saying that he was a joint maker on the note, and was not willing that it be transferred to defendant. A new note for \$150 was immediately executed by Roberts, and delivered to Schuetz for the defendant.

The sole question for decision is whether the transaction at the office of R. A. Greene shall be treated as a payment of the note, or the purchase of the mortgage by defendant. If the debt was, in fact, paid, the mortgage necessarily ceased thereafter to be a lien upon the automobile. *Gammon & Deering v. Kentner*, 55 Iowa 508. But if the parties intended that the debt and the lien of the mortgage as security therefor be continued, and not extinguished, the finding of the court below must be sustained. Much emphasis is given by counsel for appellant in argument to the fact that the mortgage was executed to protect Greene, as surety on the note to the bank, and not primarily to secure the payment of the debt, and that, as the transaction on April 7th released Greene from further liability, it had the effect to extinguish the lien of the mortgage. The payee named in the note transferred the same to Mulhern, and, at the same time, Greene assigned the mortgage to him, evidently intending it to be held by the assignee as security for the payment of the indebtedness evidenced by the note to the bank; so that, at the time of the transaction in question, Mulhern was holding the mortgage as security for the payment of the debt, and had a perfect right to transfer the same to defendant, whose rights, as the holder of

the mortgage, would be the same as his. The conclusion reached herein must, therefore, depend upon whether the transaction be treated as having extinguished the debt, or as continuing the lien of the mortgage as security for the debt, evidenced by the new note.

It is suggested by counsel for appellant that the real purpose of the transaction was to release Greene from further responsibility. On the contrary, Schuetz, who represented defendant, requested the assignment of the mortgage, and the note was destroyed by Greene, without authority from anyone. It is true that Schuetz testified that he was not particular about the note as it was executed to the bank, and it does not appear that he protested against the destruction of the note. The failure to protest does not necessarily indicate assent upon his part, or that he intended to treat the debt as paid. A new note was made out and signed by Roberts in Greene's office. The defendant must not have intended to pay the debt. There would have been no reason for the assignment of the mortgage to her, if such had been her purpose. The assignment, at the request of defendant's attorney, is some evidence of her intention to purchase the mortgage, and not to pay the indebtedness. *Olson v. Martin*, 38 Iowa 346. Certainly, Roberts did not understand or intend the check for \$150 to extinguish the debt, or he would not have given a new note. The question is one of intention. The destruction of the original note by Greene did not release Roberts from responsibility, and it is immaterial, for the purpose of our discussion, whether it operated to release Greene or not. The mortgage did not belong to him, but to Mulhern, who, by the voluntary transfer to him by Greene, held it as security for the debt. We think the lien of the mortgage was preserved, and is paramount to the judgment lien of plaintiff.

It follows that the judgment and decree of the court below must be and are—*Affirmed*.

WEAVER, C. J., LADD and GAYNOR, JJ., concur.

SECURITY SAVINGS BANK, Appellant, v. PETER WILLIAMS
et al., Appellees.

LIFE ESTATES: Mortgage of Fee by Life Tenant. Testamentary

- 1 power to a life tenant of real estate to mortgage the property, in order to raise funds for the discharge within a named time of specified legacies which are made a lien on all the land, and which become the personal debt of the life tenant by the act of taking under the will, embraces the power to mortgage the fee for the amount of said legacies and the interest accumulating thereon.

LIFE ESTATES: Power to Mortgage—Noneffective Court Order.

- 2 Testamentary power in a life tenant of real estate to mortgage the property is in no degree enlarged by an authorizing order of court, entered without notice to the objecting remaindermen.

WILLS: Interest on Legacies. Legacies draw interest from the

- 3 date of their maturity.

Appeal from Johnson District Court.—RALPH OTTO, Judge.

MARCH 23, 1920.

THE opinion states the case. The plaintiff appeals.—*Reversed*.

W. J. McDonald, Grimm, Wheeler, Elliott & Jay, and
Floyd Philbrick, for appellant.

Hart & Hart and Milton Remley, for appellees.

LADD, J.—I. Peter Williams, Sr., died testate, July 18, 1902, leaving him surviving a widow, Ellen, four daughters, and two sons. His will was admitted to probate, September

9th following, and the estate was closed, November 22, 1903. In the first paragraph of the will, the testator devised:

1. LIFE ESTATES: mortgage of fee by life tenant.

"To my beloved wife, Ellen M. Williams, a life interest in and to all real property of which I may die seized or possessed the same to use to her use and support, she to receive all rents, profits and emoluments, derived therefrom so long as she shall survive me."

In the second paragraph:

"I will and bequeath that upon the death of my said beloved wife, that my said beloved son, Peter Williams, shall have and become owner in all real estate mentioned in the next preceding paragraph of a life estate therein and upon the death of my said beloved son the said property shall pass and go to the heirs of his body and become vested in them in fee simple, absolute, provided, however, should my said beloved son die without issue then the said real estate shall pass and go to his sisters, Lizzie F., Nellie H., and Jennie A., or to the survivors of them; it being my will that all of my real estate of whatever kind or nature of which I may die seized or possessed shall first be subject to the life estate or interest of my said beloved wife as provided in the first paragraph hereof, and upon her death shall pass to my beloved son, the said Peter, and that the said son shall have a life estate therein and that he shall not be privileged to mortgage or sell the said real estate or any part thereof except that he shall be allowed to mortgage the said real estate for the purpose of obtaining money with which to pay his sisters Lizzie F., Nellie H., and Jennie A., the several sums bequeathed to them as provided in the next succeeding paragraph hereof."

The third paragraph:

"Upon the death of my beloved wife, Ellen M., I will and bequeath that my son, the said beloved Peter Williams, shall pay to my beloved daughter, Lizzie F., the sum of twen-

ty-five hundred dollars, and shall pay to my beloved daughter, Nellie H., the sum of two thousand dollars, and shall pay to my beloved daughter Jennie A., the sum of one thousand dollars, the said several sums bequeathed in this paragraph to be paid within one year from the death of my beloved wife, and to become a charge and lien upon all real estate left in my estate and passing into the hands of my said beloved son, Peter, as in the next preceding paragraph provided until said several sums are fully paid."

In Paragraph 4, the testator disposed of his personal property; and in Paragraph 5, he directed who should pay the expenses of his last sickness and burial of himself and wife, and provided for the erection of a monument at his grave. A copy of the will will be found in *Williams v. Williams*, 157 Iowa 621, in which case Peter Williams, Jr., was held to have taken a life estate only. The widow, Ellen M. Williams, departed this life, December 14, 1904. The several legacies were not paid, as required by the will,—that is, in one year from the death of the widow,—probably owing to the minority of Peter Williams, Jr., who did not attain his majority until January 3, 1909. Shortly thereafter, he was married to the defendant Lillian Williams. In November of that year, Peter Williams, Jr., and his three sisters, legatees under the will, entered into an agreement extending the time of payment of the several legacies ten years, or until his death, if sooner, stipulating therein that the lien of the legacies against the real estate shall not be released thereby. He concluded, however, in November, 1911, to borrow money and pay these legacies, and first applied to the district court, sitting in probate, for authority to borrow \$7,500 for that purpose. An order was entered in probate, directing him so to do, but without causing notice of the application to be served on his minor children. In April, 1912, the mortgage for the above amount was executed by the defendants Peter and Lillian Williams,

and all the proceeds paid on the legacies and interest thereon, and some besides; and the legatees released their claims. As interest due April 1, 1916, and on the same day of 1917, was not paid, the plaintiff, as mortgagee, instituted a suit of foreclosure. Prior to the beginning of the suit, Lillian Williams had been appointed guardian of the three minor children of herself and Peter, i. e., Ellen, Lillian and Illene, all of tender years, and, as such guardian, interposed an answer, reciting that the mortgage was executed pursuant to the terms of the last will, for the purpose of paying off the legacies provided for therein; that her wards were entitled to the proceeds of the sale of the farm in excess of the amount required to pay the mortgage described in plaintiff's petition. Decree of foreclosure was entered, May 11, 1918, and a supplemental decree was entered, four days later, directing that any excess above the amount required to discharge the mortgage should be paid over to the guardian of the minors. On July 3rd of the same year, the guardian moved that the decree be modified, so as to limit the foreclosure to the life estate of Peter Williams, Jr., so that it "shall not effect or bar the rights of said minors to their remainder of said land in fee simple, absolute, after the termination of the life estate of said Peter Williams, Jr., and that, in the decree as modified, the rights of said minors be protected, as aforesaid." Resistance was interposed, and hearing had thereon two days later. On September 28th following, a decree was entered, providing that:

"The said decree and supplemental decree heretofore entered in this cause be and the same are hereby modified and changed to the extent that the judgment herein referred to shall not have any force or effect against the said minors herein referred to, nor shall the same affect the interest of said minors in and to the real estate in said decree described."

The main issue to be determined is whether the will

authorized Peter to execute the mortgage against the entire estate, or merely his life interest. Appellee argues that, while denied the right to sell or mortgage the life estate, he was allowed to mortgage it for a specific purpose, to wit, to obtain money out of which to pay legacies. On the other hand, appellant contends that the legacies were made liens against the estate in its entirety, and he was authorized to incumber the same to secure their payment.

The order of the district court in probate, directing Peter Williams, Jr., to mortgage the land, added nothing to the authority conferred by the will. It was entered with-

2. LIFE ESTATES:
power to
mortgage: non-
effective court
order.

out notice to the minors, to whom the testator devised the remainder, or to their guardian. But the will did allow him to mortgage for a specific purpose: i. e., the payment of the legacies. That it was com-

petent for the testator to devise a life estate, coupled with the power to incumber the entire estate, appears from *Law v. Douglass*, 107 Iowa 606; *Spaan v. Anderson*, 115 Iowa 121; *Rowe v. Rowe*, 120 Iowa 17; *Steiff v. Seibert*, 128 Iowa 746. In such a case, the right to sell, mortgage, or otherwise alienate the remainder for a specific purpose, is annexed as a separate gift to the life tenant. Did the will confer on Peter Williams, Jr., the power to mortgage the estate in fee simple, or was it merely an exception to the limitation placed on his enjoyment of the life estate? To sustain the latter construction, appellee relies on *Zavitz v. Preston*, 96 Iowa 52. There, the testator devised certain described land to his grandson, Ernest G. Preston, "together with the rents and issues thereof during his natural life; he, however, paying to his mother, Ella Preston, \$5.00 each and every month during her natural life, said payments to be and remain a lien upon said premises until paid; and at the death of my grandson, Ernest G. Preston, the premises so bequeathed to him to go to, and be equally divided between, his lawful

heirs and next of kin." The only points decided were that the grandson took a life estate only, and that there was a breach of the covenant. True, the court said, in the course of the opinion, that:

"The provision for the payment of a sum to Mrs. Preston monthly during her natural life, and making it a lien upon the premises until paid, created, at most, a lien upon the estate actually granted to the devisee, and did not enlarge it."

This seems to have been pure dictum; for it was not one of the questions the court undertook to decide, as appears from the opinion. At most, it was said by way of argument, as negating any inference which might be drawn from the charge's being a lien on the remainder. The other case cited, *Giles v. Little*, 14 Otto (U. S.) 291 (26 L. Ed. 745), has since been overruled by *Roberts v. Lewis*, 153 U. S. 367 (38 L. Ed. 747), construing the fee to have passed to the widow. The principle obtains, however, as stated in *Giles v. Little*, supra, that:

"When a power of disposal accompanies a bequest or devise of a life estate, the power is limited to such disposition as a tenant for life can make, unless there are other words clearly indicating that a larger power is intended."

See *Henderson v. Blackburn*, 104 Ill. 227 (44 Am. Rep. 780). The language of wills differs so radically that little aid is to be found in the decisions of this and other courts. Three features of the will are important. The first of these is that the land devised is nowhere described, and is referred to throughout the instrument as real property or real estate. Peter Williams, Jr., is required to pay the legacies within one year after the death of the widow. They are made his indebtedness, which he assumed in accepting under the will. The legacies are made "a charge and lien upon all real estate left in my estate and passing into the hands of my beloved son, Peter, as in the next preceding

paragraph provided, until said several sums are fully paid." There can be no doubt that the legacies became a charge and lien upon the 194 acres of land in question, even though it were held that a separate power to mortgage the same was not conferred on Peter. Were we not referred to the preceding paragraph, there could be no doubt as to the expression "all real estate in my estate," for he left personal property, which was disposed of in the fourth paragraph; and these words, unmodified, must have been construed as meaning all the realty of which he died possessed. Had testator intended to encumber the life estate only, this would have been easier and better said than by referring back to another paragraph, and describing the subject to which the lien was to attach, in terms meaning the land itself,—the corpus, as distinguished from the title thereto. This necessarily is so; for, immediately following, and in the same clause, his title is limited to a life estate. The thought manifest from the language employed is that the real estate should "pass to" Peter for the enjoyment of his life interest therein; and this is in harmony with the language of the third paragraph, creating a lien for the amount of the legacies on real estate "passing in the hands" of Peter, indicating an unlimited fee. In the first paragraph, he had given his wife "a life interest in and to all real property of which" he might die seized, and in the second paragraph, it was provided that Peter, upon her death, "shall become owner in all real estate, mentioned in the next preceding paragraph, of a life estate therein;" and, to make certain that there would be no misunderstanding, he reiterated his intention that "all of my real estate of whatever kind or nature" shall be subject to the "life estate or interest" of his wife, and, upon her death, shall pass to Peter, and that he shall have a life estate therein. It is pertinent here to inquire what is to pass to Peter. There can be but one answer to that inquiry, and that is, "all of

my real estate of whatever kind or nature." As argued, a life tenant, unless denied the authority so to do, may incumber or dispose of his life estate; and, as power to mortgage the fee impinges on the remainder, and is regarded as a separate and independent gift, the intention to confer such gift must clearly appear, and, as we think, does so appear from the language employed, when construed in connection with the context and the situation of the parties. Bearing in mind that the realty being disposed of is uniformly referred to as real property, real estate, or all real estate, let us, for convenience, segregate the portion of Paragraph 2:

"It being my will that all of my real estate of whatever kind and nature of which I may die seised or possessed shall first be subject to the life estate or interest of my said beloved wife as provided in the first paragraph hereof, and upon her death shall pass to my beloved son, the said Peter, and that the said son shall have a life estate therein and that he shall not be privileged to mortgage or sell the said real estate or any part thereof except that he shall be allowed to mortgage the said real estate for the purpose of obtaining money with which to pay his sisters, Lizzie F., Nellie H., and Jennie A., the several sums bequeathed to them as provided in the next succeeding paragraph hereof."

It will be observed that the subject of disposal is "all of my real estate of whatever kind or nature;" that he first disposes of a life estate to his widow, and, following that, to his son. If he had stopped, then the son might have done with his life estate as he pleased, but he could not have incumbered the remainder; so the testator proceeded to deny him the privilege to mortgage or sell "the said real estate or any part thereof." To what "real estate" did this refer? Manifestly, that previously mentioned: that is, "all of my real estate of whatever kind or nature." He continues:

"Except that he shall be allowed to mortgage the said

real estate for the purpose of obtaining money" to pay the legacies. Can there be any question as to what was referred to in using the term "the said real estate?" We think not; for, although a life estate might be included in the expression (Section 48 of the Code), a precedent is too clearly indicated to permit of the substitution of another. His life estate was included in the term "real estate," and, in denying the privilege of mortgaging or selling the realty, he was prohibited from incumbering or selling the life estate included therein, and at the same time from mortgaging, save for a specific purpose. The power to mortgage evidently was conferred with design of enabling Peter to discharge the obligation to pay the legacies which he assumed in accepting under the will, within the time specified, and to insure the legatees the prompt payment of their shares in the distribution of their father's estate. The testator may well have concluded that the exaction of so large an amount from Peter within a year after entering upon the enjoyment of the life estate would be unfair to him, and would be likely to occasion such delay as might impair the value of the gifts to his daughters, and, to avoid these consequences, conferred the power to mortgage on Peter. The charge and lien against the land doubtless were created to make payment certain, and the testator evidently relied on his son's having sufficient interest in the use of property and in transmitting it unimpaired to his children, to induce the discharge by him of the legacies, or the mortgage executed for their payment. Appellees suggest that such a construction renders the clause giving the power, repugnant to the clause providing that, "upon the death of my said beloved son, the said property shall go to the heirs of his body and become vested in them in fee simple, absolute." This is found in the same paragraph conferring the power to mortgage. The contention is so fully disposed of by what was said in *Law v. Douglass*, 107 Iowa 606, that noth-

ing need be added. We are of opinion that a power to mortgage the entire estate was coupled with the gift of a life estate, and that the court erred in ruling that only the life estate of Peter was subject to the mortgage.

II. The legacies amounted to \$5,500, and, as previously ruled, were made a charge and lien on the entire estate. The will required their payment within one year after the widow's death, or by December 14, 1905.

3. WILLS: interest on legacies.

From this time, the legacies drew interest, and the contract between the legatees and the life tenant, in so stipulating, merely undertook to do what the law required. The courts quite generally hold that a legacy, in the absence of restrictions, statutory or otherwise, will bear interest after one year from the testator's death, or the admission of the will to probate. The time of such payment, however, may be postponed or accelerated by the requirements of the will. Here, the time of payment was definitely fixed. See, as bearing hereon, *In re Rutherford*, 196 N. Y. 311 (89 N. E. 820); *Ashton v. Wilkinson*, 53 N. J. Eq. 6 (30 Atl. 895); *Good Samaritan Hospital v. Mississippi Valley Trust Co.*, 137 Mo. App. 179 (117 S. W. 637); 40 Cyc. 2093-2099, and cases collected; 2 Woerner on Administration, Section 459. In *Buchanan v. Hunter*, 166 Iowa 663, it was observed that:

"Strictly speaking, interest on a legacy is in the nature of damages or compensation to a legatee for withholding the payment of a gift after it is due, according to the terms of the will. If not then paid, the estate of the testator or executor of his will is liable as any other debtor for legal interest from such day; and this is true, although the estate be not ready for final settlement, or the money with which to pay it be not yet available. Interest so exacted

and paid is no part of the testator's gift, but is the penalty interposed for the failure to pay it when due."

See, also, 2 Woerner on Administration (2d Ed.) 1004. The case at bar is to be distinguished from that of *Buchanan v. Hunter*, supra, for the neglect of the executor to pay as exacted in the will is not involved. Here, the burden of payment was cast upon the life tenant, though secured by the lien of the legacies against the estate. The design of the testator, manifested in the will, was that the legacies should be paid within a year after the life tenant took possession. The legacies were to be paid at a determinable date, i. e., within one year from the death of the first life tenant; and it is to be assumed, in the absence of anything to the contrary, that he intended that the law with reference to the payment of interest should apply, the same as in any case where an obligation matures and is not met by payment. The rate of interest to be charged, in the absence of other provision, is determined by the law of the domicile. *Welch v. Adams*, 152 Mass. 74 (9 L. R. A. 244), and valuable note; *Sloan's Appeal*, 168 Pa. St. 422; *Gray v. Case School of Applied Science*, 62 Ohio 1 (56 N. E. 484). Such interest is exacted when the legacy is made a charge against land. *Glen v. Fisher*, 6 Johns. Ch. *33 (10 Am. Dec. 311); *Brotzman's Estate*, 133 Pa. 478 (19 Atl. 564); *Van Bramer v. Executors of Hoffman*, 2 John. (N. Y.) 200 (1 Am. Dec. 162). See, also, collection of cases in 40 Cyc. 2101. As the second life tenant enjoyed the use of the land from the date of the death of the first-life tenant, there appears no sound reason for relieving the former from the payment of interest on the legacies from the day of their maturity. Being in the enjoyment of rents and profits of the estate, he was required, under the law, to pay the interest on incumbrances charged as liens against the estate. Had the second life tenant executed a mortgage to raise

money with which to pay the legacies, he must have charged the estate with interest on the amount borrowed. May the obligation to pay interest be obviated, in the meantime, by delays in the execution of such mortgage? We think not. Of course, the life tenant must keep the interest down, and it was the duty of Peter Williams, Jr., as between him and the remaindermen, his three children, to have paid the interest. *Wilson v. White*, 133 Ind. 614 (19 L. R. A. 581); *Damm v. Damm*, 109 Mich. 619 (63 Am. St. 601); *Tindall v. Peterson*, 71 Neb. 160 (8 Ann. Cas. 721); *Smith v. Barham*, 17 N. C. 420 (25 Am. Dec. 721). But the omission of the life tenant to pay interest will not relieve the estate, if charged with the lien for the payment thereof. As the legacies were made a lien on the land, and required to be paid at a determinable time, and, under the law, bore interest from that date, we are of opinion that the intention fairly to be implied is that the interest also was to be included in such lien. This finds strong support in the circumstance that the testator anticipated that the second life tenant, Peter, might not be able to discharge the lien on the estate at maturity, and authorized the execution of a mortgage thereon, to obtain money with which to pay the legacies. He must have contemplated that such indebtedness would bear interest, for money might not be borrowed on such security without also pledging the estate as security for payment of interest. The money might have been so borrowed at the maturity of the legacies, and thereby the land charged with the payment of the interest. He must have intended, then, the interest to be a charge on the land; and we are of opinion that the interest on the legacies from maturity, in connection with said legacies, constituted a lien on the realty devised by the decedent. The court erred in modifying the decree.—*Reversed*.

WEAVER, C. J., GAYNOR and STEVENS, JJ., concur.

Plaintiff alleged in his petition that the contract for said services was oral, and was entered into in the state of South Dakota; that the defendants were, at the time of the commencement of this suit, the owners and holders of stock in said corporation as follows: F. L. Maytag, 9,569 shares; E. H. Maytag, 52 shares; L. B. Maytag, 212 shares; and Sam Fantle, 340 shares; that the par value of said stock was \$100, and that 87½ per cent thereof remained unpaid.

Plaintiff further alleged that Section 441 of the Civil Code of South Dakota, copy of which is set out in the petition, makes each stockholder of a corporation individually and personally liable for the debts of the corporation, to the extent of the amount unpaid upon the stock held by such stockholder. Other provisions of the Code are also set out in plaintiff's petition, which will be referred to hereafter. The Maytags and Fantle filed separate answers, in both of which it is alleged that Section 441 contravenes the provisions of Section 8, Article 17, of the Constitution of South Dakota, and that same is, therefore, void, and of no effect. Other constitutional provisions are pleaded, which it is unnecessary to set out at this time. Defendants also set up the statute of limitation; and the Maytags, that they obtained the stock without notice or knowledge that same had not been paid for in full. Other material issues and facts will be referred to in the course of the opinion. The trial resulted in a judgment against F. L. Maytag and Sam Fantle for the full amount of plaintiff's claim, and against E. H. Maytag for \$4,719, and against L. B. Maytag for \$21,780.

I. The defendant Fantle, at the time the services were rendered by plaintiff, was a resident of Sioux Falls, South Dakota, where he has continued to reside. His plea of the statute of limitations is bottomed upon the thought that a cause of action in favor of the corporation for the unpaid portion of the purchase price of the stock arose immediately upon the sale thereof, and, under Section 60 of the

Code of Civil Procedure of South Dakota, became barred in six years, thereby ceasing to be an enforceable liability against the stockholders; and that, as the liability of the corporation to plaintiff grows out of the obligation of the stockholders to the corporation, the bar was complete when this suit was begun. All of the stock held by the defendants was issued and sold by the railway company more than six years before the services rendered by plaintiff were begun.

On the other hand, counsel for appellee asserts that the statute did not commence to run until plaintiff's cause of action against the corporation matured. There may be some lack of harmony in the decisions upon this question, but the general rule undoubtedly is that the statute commences to run in favor of the stockholders from the time claims of creditors against the corporation mature. Under the law of South Dakota, the liability of the holder of corporate stock to creditors of the corporation for the difference between the par value thereof and the amount actually paid thereon is primary, and a creditor is not required to first proceed against the corporation. It is stated in Cook on Corporations (7th Ed.), Section 225, that:

"Where the liability of the stockholder is immediate and primary, and not contingent on the obtaining of a judgment against the corporation, it is clear that the statute of limitations begins to run in favor of the stockholder when the debt matures against the corporation."

We find, upon examination of the authorities cited, that much of the apparent lack of harmony appearing therein is due to the dissimilarity of the various statutory provisions considered. In some jurisdictions, the statute does not commence to run against creditors until the insolvency of the corporation; but it makes no difference in this case whether the statute commenced to run from the maturity of plaintiff's claim against the railway company, or its insol-

vency. The services were rendered before the appointment of the receiver. The cause of action which plaintiff seeks to enforce against the defendants is not, however, one that arose in favor of the corporation, but is a liability which, under the South Dakota statute, accrued directly to him. The capital stock of a corporation is a fund for the payment of debts—a trust fund. The doctrine of the so-called trust fund rests upon the proposition that, as the state has relieved the stockholder from general liability for the debts of the corporation, he ought, in good faith, to pay, in money or its equivalent, to the extent of the face value of the stock received. The corporation may never demand payment of any unpaid portion of the purchase price of said stock. Payment may not be necessary until the rights of creditors intervene, and their claims must be met. Surely, a cause of action which could not accrue until more than six years after the issuance of the stock held by the defendants, cannot be barred by the statute of limitations, and the overwhelming weight of authority sustains the rule quoted from Cook on Corporations. *Parmelee v. Price*, 208 Ill. 544 (70 N. E. 725); 1 Cook on Corporations (7th Ed.), Section 225; *Chapman v. Lynch*, 156 N. Y. 551 (51 N. E. 275, 276); *West v. Topeka Sav. Bank*, 66 Kan. 524 (97 Am. St. 385); *O'Neill v. Quarnstrom*, 6 Cal. App. 469.

II. Section 441 of the Civil Code of South Dakota is as follows:

“Each stockholder of a corporation is individually and personally liable for the debts of the corporation to the extent of the amount that is unpaid upon the stock held by him. Any creditor of the corporation may institute joint or several actions against any of its stockholders that have not fully paid the capital stock held by him, and in such actions the court must ascertain the amount that is unpaid upon the stock held by each stock-

2. CORPORATIONS:
unpaid install-
ments on stock:
constitutional
law: foreign
state.

holder and for which he is liable, and several judgment must be rendered against each in conformity therewith. The liability of each stockholder is determined by the amount unpaid upon the stock or shares owned by him at the time such action is commenced, and such liability is not released by any subsequent transfer of stock. And in no other case shall the stockholders be individually and personally liable for the debts of the corporation. The term 'stockholder,' as used in this section, shall apply not only to such persons as appear by the books of the corporation to be such, but also to every equitable owner of stock, although the same appear upon the books in the name of another."

The provisions of the above section are assailed by counsel for appellant, upon the ground that same contravenes the provisions of Section 8, Article 17, of the Constitution of South Dakota, which is as follows:

"No corporation shall issue stocks or bonds except for money, labor done, or money or property actually received; and all fictitious increase of stock or indebtedness shall be void. The stock and indebtedness of corporations shall not be increased except in pursuance of general law, nor without the consent of the persons holding the larger amount in value of the stock first obtained, at a meeting to be held after sixty days' notice given in pursuance of law."

They also state that it contravenes the provisions of the Fourteenth Amendment to the Constitution of the United States, and is, therefore, void. Section 423 of the Civil Code of South Dakota provides that:

"Whenever the capital stock of any corporation is divided into shares and certificates thereof are issued, such shares of stock are personal property, and may be transferred by endorsement by the signature of the proprietor or his attorney or legal representative and delivery of the certificate, but such transfer is not valid except between the

parties thereto, until the same is so entered upon the books of the corporation as to show the names of the parties, by and to whom transferred, the number or designation of the shares, and the date of the transfer."

We have been unable to find any decision of the Supreme Court of South Dakota wherein the constitutionality of Section 441 has been passed upon or discussed; but counsel for appellee have cited numerous cases from other jurisdictions, construing similar constitutional provisions, to which attention will be directed presently. However, the decision of the Supreme Court of South Dakota in *Schiller Piano Co. v. Hyde*, 39 S. D. 74 (162 N. W. 937), is based upon a related proposition. In that case, the United Mercantile Agency, a South Dakota corporation, received \$20,000 in notes, in payment of the purchase price for certain shares of stock sold to the defendant. Certificates were issued and delivered to him. Thereafter, defendant gave the notes in suit, aggregating \$10,000, in renewal of that much of his previous obligations. The notes were transferred to plaintiff, with notice of the consideration therefor, and, upon the refusal of defendant to pay the same, suit was brought thereon. The trial court directed a verdict in favor of the defendant, upon the ground that the original notes were void, because the transaction out of which their execution arose, was in violation of Section 8, Article 17, of the Constitution of that state. Upon appeal, the ruling of the trial court was reversed. In the course of the opinion, the court said:

"It seems to us that the decision of the trial court was wrong for either of three reasons: First, a promissory note is property, within the meaning of the constitutional provision; second, even though a promissory note is not property, within the meaning of such provision, the taking of a note for shares of stock is not unlawful,—it is the

delivery of the certificates under such a condition that would be unlawful; third, estoppel."

The court did not conclude its opinion with the finding that promissory notes, within the meaning of the constitutional provision, are property, but proceeded further, upon the assumption that they could not be so considered. The conclusion reached upon this assumption was that the original subscription for the stock was not unlawful; that, at most, the delivery of the certificates of stock was illegal; that the obligation of the subscriber was in no wise affected by the premature or illegal surrender of the certificates; and that the giving of promissory notes merely changed the form of defendant's obligation. It is true that the constitutionality of Section 441 was not involved in this case, but an obligation arising out of a subscription for shares of capital stock to a corporation, followed by a delivery of the stock before full payment, is therein held to be not invalid, under the constitutional provision quoted; that indebtedness created in this manner is bona fide, and the subscriber liable to the holder of his obligation given therefor. Section 441 goes no further than the holding of the court in the above case. The former creates a liability against the shareholder, in favor of creditors of the corporation, for the amount of the unpaid portion of the purchase price of the stock; whereas, the decision of the court goes to the extent of holding that a subscription and mere promise to pay for stock create a valid obligation. This conclusion has ample support in the decisions of other courts, dealing with similar constitutional provisions. *Washer v. Smyer*, (Tex.) 211 S. W. 985; *Olson v. State Bank*, 67 Minn. 267 (69 N. W. 904); *Dilzell Eng. & Const. Co. v. Lehmann*, 120 La. 273 (45 So. 138); *California Trona Co. v. Wilkinson*, 20 Cal. App. 694 (130 Pac. 190); *McWhirter v. First St. Bank*, (Tex.) 182 S. W. 682; *Herron Co.*

v. Shaw, 165 Cal. 668 (133 Pac. 488); *Vermont Marble Co. v. Declez Gran. Co.*, 135 Cal. 579 (67 Pac. 1057; 87 Am. St. 143); *Houston F. & M. Ins. Co. v. Swain*, (Tex.) 114 S. W. 149; *Lucey Co. v. McMullen*, 178 Cal. 425 (173 Pac. 1000); *Continental Trust Co. v. Toledo, etc., R. Co.*, 82 Fed. 642; *Scott v. Abbott*, 160 Fed. 573; *Memphis & L. R. R. v. Dow*, 120 U. S. 287 (30 L. Ed. 595).

We are not inclined, in view of what is said in *Schiller Piano Co. v. Hyde*, supra, and numerous other cases cited above, to hold that Section 441 of the Civil Code of South Dakota contravenes Section 8, Article 17, of the Constitution of that state. It is true that the Constitution of South Dakota makes the issuance of certain stock void, but we think this provision relates only to fictitious increases of stock, and not to stock issued for a valid consideration. Such is the conclusion announced in several of the cases cited supra, wherein practically the identical provision was discussed. No claim was made in the court below that Section 441 is in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States; hence, the contention of counsel upon this point cannot be considered upon this appeal. *Hass v. Levertton*, 128 Iowa 79.

III. The court, in *Schiller Piano Co. v. Hyde*, supra, further held that the defendant was estopped to deny liability upon the ground that the stock held by him was wrongfully issued. Upon this point, the court said:

3. ESTOPPEL:
plea based on
violation of
law: corporate
stock.

"It is a maxim of jurisprudence that no man can take advantage of his own wrong. If the delivery of the certificate of stock to defendant, at the time it was delivered, was wrong, the defendant was a party to the wrong. 'He who consents to an act is not wronged by it.' In *German Merc. Co. v. Wanner*, 25 N. D. 479 (142 N. W. 463), we find the following:

"It is held in *Wight v. Shelby R. Co.*, 16 B. Mon. (Ky.) 4 (63 Am. Dec. 522), that, where it was the duty of the subscriber for capital stock to pay at the time the subscription was made, he could not exonerate himself from liability because he had been allowed to take advantage of his own wrong by not paying at that time.' The statement of facts at the beginning of this opinion discloses a situation that should forever estop defendant from asserting the constitutional provision as a defense. To hold otherwise would, in the language of Mr. Justice Holmes, be 'contrary to the rudiments of fair play.'"

The stock held by defendants was not fictitious, nor was it issued as a bonus, but for a valid consideration, and it is contended by counsel for the Maytags that it was paid in full, in cash and labor. The original subscribers were engaged in the promotion of a railroad enterprise, the building of which was either at the time under way, or begun shortly thereafter, as several miles of railroad were constructed, and are now in operation. Without reviewing in detail the many authorities cited by counsel, attention is called to the following, which support the doctrine of estoppel. *Washer v. Smyer*, supra; *Dilzell Eng. & Const. Co. v. Lehmann*, supra; *Vermont Marble Co. v. Declez Gran. Co.*, supra; *McWhirter v. First St. Bank*, supra; *California Trona Co. v. Wilkinson*, supra; *Perkins v. Cowles*, 157 Cal. 625 (137 Am. St. 158); *Vaughn v. Alabama Nat. Bank*, 143 Ala. 572 (42 So. 64); *Building & Loan Assn. v. Chamberlain*, 4 S. D. 271 (56 N. W. 897); *Lilylands Canal & Res. Co. v. Wood*, 56 Colo. 130 (136 Pac. 1026); *Shaw v. Staight*, 107 Minn. 152 (119 N. W. 951); *Olson v. State Bank*, 67 Minn. 267 (69 N. W. 904). It should be said in this connection that none of the stock held by Fantle was purchased from the corporation, although a few shares were issued to him direct thereby.

IV. Counsel for appellant Fantle argues at length that he purchased the stock held by him without notice; that it was not fully paid for; and that he is, therefore, an innocent holder, and cannot be held liable for

4. CORPORATIONS:
unpaid stock:
innocent purchaser.

any portion of the unpaid purchase price thereof. It is doubtful whether appellant, under the issues, is entitled to urge this defense at this time; but, in view of the interpretation of Section 441 of the Civil Code of South Dakota adopted, it is, perhaps, not material. It will be observed that this section provides that "each stockholder of a corporation is individually and personally liable for the debts of the corporation to the extent of the amount that is unpaid upon the stock held by him," and defines the term "stockholder" as follows:

"The term 'stockholder' as used in this section shall apply not only to such persons as appear by the books of the corporation to be such, but also to every equitable owner of stock, although the same appears upon the books in the name of another."

Under the above statutes, appellant was a stockholder. According to the undisputed evidence, same had been issued upon the payment of a small percentage of the par value thereof. The language of Section 441 is, "*each stockholder.*" No limitation is placed thereon, nor do we find anything in the language of said section from which the inference may be drawn that it was the intention of the legislature to exempt subsequent purchasers of stock, even without notice, from liability for the unpaid portion of the purchase price. It is urged by counsel that to so hold will seriously interfere with the sale of stock, but this affords little reason for giving a forced or strained construction to the statute. The means of knowing whether the stock has been paid for is certainly available to a person desiring to purchase stock in any reputable concern, and the burden

of ascertaining this fact should not create a serious obstacle in the way of stock transactions. The liability imposed by the statute, it seems to us, must be held to follow the stock. It is a liability imposed upon the stockholder. It is designed for the protection of creditors, and was not enacted for the benefit of stockholders. It is true that the courts are divided upon the question as to the liability of an innocent purchaser of stock, but we are controlled in this case by the statute of South Dakota, and must give effect thereto. As sustaining our conclusion, attention is called to the following cases: *Bartlett v. Stephens*, 137 Minn. 213 (163 N. W. 288); *Aaford v. Western Synd. Inv. Co.*, 141 Minn. 412 (170 N. W. 587); *Webster v. Upton*, 91 U. S. 65 (23 L. Ed. 384); *Visalia R. & T. Co. v. Hyde*, 110 Cal. 632; *Bell's Appeal*, 115 Pa. St. 88.

Counsel for appellant lays much stress upon the holding of the North Dakota court in *LaVell v. Bullock*, (N. D.) 174 N. W. 764. That was an action by the trustee in bankruptcy of a corporation known as "Everybody's Store," having its place of business at Fargo, against the holder of 14 shares of its common stock. The court, in the opinion written by Mr. Justice Robinson, holds that there was nothing due the corporation on the stock, and that, consequently, no cause of action existed in favor of the plaintiff as the representative thereof. Mr. Justice Birdzell, specially concurring in the result reached by the majority, held that the stock in question was issued as a bonus, and was, therefore, void, under Section 138 of the Constitution of that state. What is said thereafter by him is in response to the argument of counsel for respondent that the defendant was an innocent purchaser of the stock, which was sold to him as fully paid, and is concurred in by but one other member of the court, and a district judge, sitting in place of a member of the court disqualified, and possibly should be treated as dictum; but, if the conclusion announced represents

the views of the North Dakota court, it is, for the reasons indicated, without controlling importance in the case at bar.

The stock held by F. L., E. H., and L. B. Maytag was all originally owned by F. L. Maytag, and issued to him either originally, or with full knowledge of the affairs of the company. Of the several issues of stock authorized by the corporation, 9,569 stood on the books of the company in the name of F. L. Maytag. For all of this stock, he advanced $12\frac{1}{2}$ per cent of the par value in cash, and it is argued by counsel on his behalf that a portion, at least, of it was paid for in labor. Without reviewing the evidence upon this question, suffice it to say that we have carefully read the testimony relied upon by counsel, and are satisfied that no credit should be allowed upon this claim. As between the corporation and the stockholders, the issue of stock for labor which was not performed, and for which no claim was ever presented or allowed by it, may be binding, but not upon creditors seeking to enforce a claim, under the statute against such stockholders. The finding and conclusion of the court below upon this question are, we think, amply supported by the evidence.

Before the commencement of this suit, plaintiff and his attorneys made demand upon F. L. Maytag, with whom the negotiations for the services rendered were had, for the payment of the claim in controversy. No effort was made, at the time, by Maytag to conceal the facts concerning the stock held by him and his sons, or concerning the affairs of the corporation. Its assets had simply been absorbed by the bondholders, who had foreclosed the mortgage held by them, and the property had been sold under execution, leaving nothing for the satisfaction of the claims of creditors. It appears from the evidence, however, that, shortly thereafter,

5. CORPORATIONS :
stock issued
for unper-
formed labor.

6. CORPORATIONS :
liability of
transferor of
unpaid stock.

an attempt was made to transfer all of the stock held by the Maytags to one G. A. Smith, to whom the stock was delivered, under an agreement in writing, reciting a consideration of \$25,000. It is admitted, however, in the evidence that the true consideration was \$25. The stock was not transferred upon the books of the corporation, and, at the time of the commencement of this action, stood in the name of F. L., E. H., and L. B. Maytag, respectively.

Section 423 of the Civil Code of South Dakota provides:

"Whenever the capital stock of any corporation is divided into shares and certificates thereof are issued, such shares of stock are personal property, and may be transferred by endorsement by the signature of the proprietor or his attorney or legal representative, on delivery of the certificate; but such transfer is not valid except between the parties thereto, until the same is so entered upon the books of the corporation as to show the names of the parties, by and to whom transferred, the number or designation of shares, and the date of the transfer."

The exhaustive research of counsel has resulted in bringing to our attention but one decision of the Dakota court in which the above portion of Section 423 has been given construction: *State Bank. & Trust-Co. v. Taylor*, 25 S. D. 577 (127 N. W. 590, 594). This was a case in which one creditor of the holder of certain shares of corporate stock attached the certificates in the possession of another creditor of said stockholder, who held the same under a written assignment, as collateral security. The court sustained the assignment; but it will be observed that the controversy here was not between the corporation and a creditor of the corporation, who sought to recover, under Section 441 of the Civil Code, for the difference between the par value of the stock and the amount actually paid by the stockholder, but involved the claim of a creditor having nothing to do with the corporation issuing the stock. The

point upon which the decision of the court really rested was that Section 445, which requires all records referred to in Section 423 to be open to the inspection of any director, member, stockholder, or creditor of the corporation, and which further provides that, "in addition to the records above required to be kept, corporations for profit must keep a book to be known as the 'stock and transfer book' in which must be kept a record of all stock; the names of the stockholders or members, alphabetically arranged; installments paid or unpaid; assessments levied and paid or unpaid; a statement of every alienation, sale or transfer of stock made, the date thereof, and by and to whom; and all such other records as the by-laws prescribe. Corporations for religious and benevolent purposes must provide in their by-laws for such records to be kept as may be necessary. Such stock and transfer book must be kept open for the inspection of any stockholder, member or creditor,"—is not a public registration act, and that the right of a pledgee of corporate stock, though such transfer is not entered in the stock book, is superior to that of a subsequent attaching creditor of such pledgor, whether the creditor had notice of the transfer or not. The court said:

"Holding, as we do, that Section 445, Rev. Civ. Code, is not a public registration act, the following words from the *Lipscomb* case (*Lipscomb's Admr. v. Condon*, 56 W. Va. 416 [49 S. E. 392]), become applicable to the case at bar: 'It is obvious that, unless Section 36 or some other provision of the statute is to be regarded as a registration law for the protection of the public, who have no access to the books of the company, these sections are intended only to protect the corporation and those who claim under the certificates of stock.'"

The decision is not, therefore, conclusive, if, indeed, it is in point. The statute specifically makes transfer of cor-

porate stock valid between the parties, whether entered upon the books of the corporation or not. The transfer of the stock to Smith, as already stated, was made after the demand of plaintiff for payment of his claim, and for a purely nominal consideration. Maytag was still held out by the books of the corporation as a stockholder, and, in view of the provisions of the Code of South Dakota, and the circumstances surrounding the transfer of the stock, it cannot be applied, as against the plaintiff, to relieve the defendants from liability.

A further claim of appellant Fantle's should be referred to. A portion of the stock held by him was originally held by a creditor of one Root's, as security for the payment of a note for \$2,500, also signed by Fantle as surety. Root defaulted in the payment of the note. It was paid by appellant, to whom the stock was transferred.

7. CORPORATIONS:
unpaid stock:
"stockholder"
defined.

It is contended by counsel for appellant that he should not have been held liable on account of this stock; but it stood upon the books of the corporation in his name, and we fail to see wherein the manner by which he acquired ownership thereof is material. The services were rendered by plaintiff without knowledge of the financial condition of the corporation, and his claim is undisputed. After a careful review of the record and many authorities cited by counsel upon both sides, we are satisfied that the judgment and decree of the court below is right, and must be—*Affirmed*.

WEAVER, C. J., LADD and GAYNOR, JJ., concur.

SARAH A. SZYMANSKI, Appellee, v. PETER PAUL SZYMANSKI,
Appellant.

HOMESTEAD: Retirement Pay of a Soldier Not a Pension. A
1 homestead is not rendered exempt because purchased with

money paid by the Federal government to an ex-soldier after his retirement from the army, as a continuance of his pay while in the service.

DIVORCE: Alimony—Setting Aside Exempt Property. Alimony 2 may consist of specific property, whether exempt or not.

DIVORCE: Alimony—Vesting Title in Daughter. No statutory authority exists for assigning alimony, and requiring the title to be vested in a daughter. Allowance reviewed, and modified as excessive.

Appeal from Polk District Court.—GEORGE A. WILSON,
Judge.

MARCH 23, 1920.

SUIT for divorce. The facts are stated in the opinion.
—*Modified and remanded.*

John L. Gillespie, for appellant.

Blake & Blake, for appellee.

STEVENS, J.—Defendant appeals from a decree granting plaintiff a divorce upon the ground of cruel and inhuman treatment, alimony, and an allowance for the support of an adopted daughter. Plaintiff, at the time of the trial, was 51 years of age, had been three times previously married, and had two minor children, aged 12 and 14 years, respectively. The parties were married on November 26, 1914. On August 29, 1918, they adopted a female child, about 7 months old. Defendant, who is 55 years of age, served a trifle over 31 years in the regular army, is a tailor by trade, and, at the time of the marriage, was retired from the army on pay. Many acts of cruelty toward plaintiff and her children are recited in the evidence, and defendant admits that, upon one occasion, he became angry, and destroyed a large amount of her furniture. While the evidence is more or less conflicting, a careful reading of

the record satisfies us that the court properly granted plaintiff a divorce and alimony. No good purpose will be served by a detailed review or discussion of the evidence. Counsel for appellant concedes that, if the testimony on behalf of plaintiff is credible, it is sufficient to sustain the decree. The court had the parties before it, and was in a better position to judge of the credibility of their testimony.

Much of the contention of counsel for appellant relates to the question of alimony. The property holdings of the respective parties, at the time of the marriage, were about as follows: Plaintiff was receiving the income from 120 acres, and owned two separate tracts, of 76 and 40 acres, respectively, in Polk County. She also had stock, grain, farm implements, and household furniture of considerable value. \$550 was due her as the balance of the purchase price of some city property. This was paid shortly after the marriage. By the terms of her husband's will, from whom she received her interest in the real estate above referred to, she forfeited the right to the income from the 120-acre tract by her marriage with defendant. Defendant, having served for something over 31 years in the regular army, was retired on pay. He is a tailor by trade, and, when employed, receives good wages. He also, at the time of the marriage, had a contract for the property which thereafter became their homestead, on which he had paid \$630, and still owed a balance of \$620, which was paid later. He had some household furniture, the value of which is not shown. Plaintiff claims that she expended at least \$1,000 in improvements on the residence property, and that she has purchased most of her own clothing, and contributed substantially to the support of the family. The defendant, on the contrary, testified that, except for the few dollars retained by him each month out of his pay check of

\$67.50, and the occasional payment of bills for the family, he turned the proceeds thereof over to plaintiff.

It is agreed that the homestead is worth \$2,500. Plaintiff testified that she sold the grain, stock, and farm implements owned by her, and that the defendant, in a fit of anger, broke up and destroyed household goods belonging to her, of the value of \$900, for which defendant agreed to reimburse her. According to her testimony, he paid her \$270, and replaced her damaged piano with one valued at \$395. The court awarded plaintiff all of the household goods and furniture in her possession, including those previously owned by defendant, and the use, rents, and profits of the homestead property during her lifetime, title to which was placed in Mary Gladys Szymanski, the adopted daughter; required defendant to pay plaintiff \$20 per month until \$500 was paid, or until otherwise ordered by the court; and rendered judgment against him for costs, together with \$100 attorney fees. It is agreed by the parties that the homestead was paid for by defendant out of money received by him as a retired soldier, from the United States government; and counsel for appellant claims that same is exempt, under Section 4010 of the Code; that the court exceeded its authority in transferring the property to the adopted daughter of the parties; and that the award of alimony is grossly excessive.

Section 4010 of the Code of 1897 is as follows:

"The homestead of every such pensioner, whether the head of a family or not, purchased and paid for with any such pension money, or the proceeds or accumulations thereof, shall also be exempt; and such exemption shall apply to debts of such pensioner contracted prior to the purchase of the homestead."

Section 4747, Revised Statutes of the United States, exempts pensions from levy or seizure under any process.

1. **HOMESTEAD:**
retirement pay
of a soldier
not a pension.

legal or equitable, while the same remains with the pension office, or in the hands of any officer or agent thereof, or in the course of transmission to the pensioner. Construing this section, the Supreme Court of the United States, in *McIntosh v. Aubrey*, 185 U. S. 122 (46 L. Ed. 834), held that the exemption therein allowed does not apply after the money has actually passed into the hands of the pensioner; so that, if the monthly sum received by the defendant from the United States government be treated as pension money, then the question of its exemption must be determined according to the provisions of Section 4010, quoted above.

26 Statutes at Large 1082 provides:

"That hereafter no pension shall be allowed or paid to any officer, non-commissioned officer, or private in the army, navy, or marine corps of the United States, either on the active or retired list."

Section 2082 of the Compiled Statutes of the United States is as follows:

"When an enlisted man has served as such thirty years in the United States army or marine corps, either as private or noncommissioned officer, or both, he shall by application to the president be placed on the retired list hereby created, with the rank held by him at the date of retirement, and he shall receive thereafter seventy-five per centum of the pay and allowances of the rank upon which he was retired: Provided, That if said enlisted man had war service with the army in the field, or in the navy or marine corps in active service, either as volunteer or regular, during the War of the Rebellion, such war service shall be computed as double time in computing the thirty years necessary to entitle him to be retired."

So far as we are aware, the pay of a retired soldier has never been treated as a pension, under the statutes of the United States or the statutes of the various states exempting the same from seizure under legal process. The word

"pensioner," as used in our statute, must be given its usual and ordinary meaning, and has application to individuals formerly in the military service of the United States who, either on account of disability or by act of Congress, receive annually a fixed sum, payable, ordinarily, in quarterly installments. A retired soldier, receiving pay, cannot, under the United States statutes, receive a pension. The theory upon which pensions are allowed is entirely different from that upon which a soldier's monthly pay is continued, after his retirement from the army. We do not think defendant can claim the homestead or other property or money as exempt, under the provisions of Section 4010.

In any event, the court has full authority to set aside specific property of the husband to the wife as alimony, whether exempt or not. Ordinarily, exemptions are allowed for the benefit of the family. It is true

2. Divorce: alimony: setting aside exempt property. that the exemption of pension money, or property purchased therewith, extends to every pensioner, whether the head of a family or not; but surely, it was not the intention of the legislature, in exempting pension money, or property purchased therewith, from execution, to change its status with reference to the inchoate rights of the wife to dower or alimony therein. The defendant cannot complain of the decree, in so far as it confers the right upon plaintiff to the use thereof during her lifetime, upon the ground that it was exempt property. Whether exempt or not, the authority of the court to award the same to plaintiff as alimony cannot be questioned. *Daniels v. Morris*, 54 Iowa 369; *Williamson v. Williamson*, 185 Iowa 909; Section 3180, Code.

We are inclined to agree, however, with appellant's claim that the amount awarded to plaintiff for the support and maintenance of the adopted daughter is excessive. No

3. **DIVORCE: alimony: vesting title in daughter.** authority to transfer the property to Gladys, the adopted daughter, is conferred by statute. The provision of the decree requiring defendant to pay \$500, in monthly installments of \$20, for the support of Gladys, will be set aside, subject, however, to the right of the court below to make further provision for the support of said child, if, at some later time, upon proper application therefor, the court shall deem it advisable and necessary to the welfare of said child that this be done. In view of the conclusion just announced, we think the decree should be further modified, so as to give the homestead absolutely to the plaintiff. She will be charged with the support of the child; and, if defendant is relieved from making the monthly payments at this time, plaintiff should be given a larger interest in the homestead. In all other respects, the decree is affirmed. The evidence as to the amount of her own money expended by plaintiff in improving the homestead, and in the support of the family, is conflicting; but the court below, who had the parties before it, evidently accepted the version of plaintiff, and with this holding we are content. It follows that the decree will be modified in the respects indicated, and the cause is remanded to the district court for that purpose.—*Modified and remanded.*

WEAVER, C. J., LADD and GAYNOR, JJ., concur.

CITY OF KEOKUK, Appellee, v. HARRY SCHULTZ, Appellant.

INDICTMENT AND INFORMATION: Reinstating Cause after In-

1 **advertent Dismissal.** Courts have power to reinstate a criminal proceeding inadvertently dismissed.

INDICTMENT AND INFORMATION: Notice of Application to Re-

2 **instate Dismissed Action.** One who has notice of the time and place of hearing of an application to reinstate an inadvertently

dismissed information must inform himself, at said time and place, of the *future* time and place when the court can and will grant a hearing.

INDICTMENT AND INFORMATION: Sufficiency of Notice to Re-
3 **instate Dismissed Action.** One may not say he had no notice of the reinstatement of a dismissed information, when he moved to set aside the *reinstatement*, and had a full hearing on the merits.

COURTS: Correction of Unsigned Record. It will be presumed that
4 the correction of a court record was made before it was signed by the judge. (Sec. 243, Code, 1897.)

CRIMINAL LAW: Limitation of Prosecution—Reinstating Inad-
5 **vertently Dismissed Information.** Reinstating an inadvertently dismissed information reinstates the standing which such information had prior to the dismissal, even though such reinstatement was made at a time when more than a year had elapsed since the commission of the offense.

Appeal from Lee District Court.—W. S. HAMILTON, Judge.

APRIL 6, 1920.

THE appeal is from conviction of violating a city ordinance, enacted by a city under special charter.—*Affirmed.*

James S. Burrows, for appellant.

John S. Sprouls, for appellee.

SALINGER, J.—I. The appellant took his conviction to the district court. There, it seems to have been at first properly entitled, but the name of the plaintiff was erased, and "State of Iowa" substituted therefor.

1. **INDICTMENT AND INFORMATION:** reinstating cause after inadvertent dismissal. A record entry recites that this case, entitled *State of Iowa v. Harry Schultz* "was dismissed on motion of county attorney."

There is no room for doubting that no one authorized to move a dismissal on behalf of the city ever did so, and that the dismissal by the county attorney was due to some mistake on his part. At least, there was no

intention on part of anyone to dismiss the case of *City of Keokuk v. Harry Schultz*. On application by the city to reinstate the case, the court did reinstate, and ordered that the case "be placed on the criminal docket of the court."

It is actively objected by the appellant that the court had no power to make this reinstatement. We perceive no good reason why, if power to reinstate exists in any case, it does not apply to a criminal case, and we

2. INDICTMENT
AND INFORMATION:
notice of application
to reinstate dismissed action.

hold the court had the power to reinstate such a case. But it is said that, if the power be granted, there was no jurisdiction to exercise it in this case, because no notice was served on defendant that the court intended to make such order of reinstatement. And in that connection, a violation of Section 12, Article 1, of the Constitution of Iowa is asserted. There was notice given of the application to reinstate. On the whole record, it is not claimed that this is not so, but the exact contention is that the notice cited defendant to appear in court at a certain time; that he did so appear; that the judge before whom the matter was to be heard was then absent, because of sickness, and no other judge was present; and that no new notice was given of the later time at which the motion to reinstate was heard and sustained.

We see no merit in this contention. Followed to its logical end, if, when the parties appeared, the judge was too busy to hear them, it would require a new notice, fixing a time and place of hearing. We are of opinion that, the

3. INDICTMENT
AND INFORMATION:
sufficiency of notice
to reinstate dismissed action.

notice being given, and the parties thereupon appearing in court, both were charged with the duty of ascertaining at what time the matter might be taken up by the court. But this point does not need to be pressed; for it appears that, later, the appellant applied to the court to set aside the order of reinstatement,

and that both parties were present and participated at the hearing of this motion. Granting, for the sake of argument, that the order of reinstatement was void for want of notice, the application to set aside that order tendered every issue triable on the application for reinstatement, and the decision on that motion cannot be invalidated because the earlier decision might be.

II. We gather it is further urged that, the order of dismissal having been made of record, the court could not set it aside at a term subsequent to the one in which the entry was made. It may be conceded, for the sake of argument again, that this would be true if, in fact, there had been a dismissal. But surely, there is power in the court to vacate a dismissal which it never intended to make, and which is due to a misapprehension of either fact or law. See *National Loan & Inv. Co. v. Bleasdale*, 159 Iowa 529; 18 C. J. 1200. It may well be added that the statute gives power to alter entries, even if made and signed at a previous term, in order to correct "an evident mistake." Code Section 244. Further, Code Section 243 provides that the court may amend an entry at any time during the term, "or before it is signed by the judge," and nothing appearing in this record shows that the entry ordering a dismissal was ever signed by the judge.

III. Lastly, it is presented that the statute bars prosecution after one year subsequent to the offense of violating an ordinance. That is true. But appellant seems to claim that the statute bar arises if trial be not had within one year after the commission of the charged offense. We find no warrant for such a position. It is safe to state, as a general proposition, that, if complaint is lodged within the statute time, the statute is at once arrested, and that mere delay in trial creates no

4. Courts : correction of unsigned record.

5. CRIMINAL LAW : limitation of prosecution : reinstating inadvertently dismissed information.

bar to prosecution. The argument at this point, is quite evidently founded upon the thought that the dismissal ended the lodging of complaint, and that, when reinstatement was ordered, it operated merely to permit complaint to be then lodged, and that this permission was given at a time more than a year after the commission of the offense. If the premises were granted, the deduction urged is inevitable. But the premise is faulty. The reinstatement placed the case precisely where it stood before the dismissal. It operated to set down a case for trial in which the information had been lodged in time. The statute of limitations is not available, because neither the dismissal nor the reinstatement changed the time at which the prosecution was actually commenced—and that was within statute time.

There is no complaint that the conviction should not stand on the merits, and we are constrained to hold against the objections that are presented. It follows the order made below must be—*Affirmed*.

WEAVER, C. J., EVANS and PRESTON, JJ., concur.

LOTTIE DULL, Appellee, v. THOMAS DULL, Appellant.

DIVORCE: Modification of Alimony Provisions Because of Remarriage. Alimony decrees for the benefit of minor children will not be modified on the sole ground that the plaintiff mother has remarried, especially when there is no showing of change in the financial condition of the parties.

Appeal from Mahaska District Court.—HENRY SILWOLD,
Judge.

APRIL 6, 1920.

THE trial court refused to modify an allowance of alimony. Therefore, defendant appeals.—*Affirmed*.

J. G. Patterson, for appellant.

W. H. Keating and *David S. David*, for appellee.

SALINGER, J.—The alimony provision charges the defendant with supporting plaintiff and their minor child, to the extent of contributing \$4.00 per week, payable semi-monthly. It is from this obligation that the appellant seeks to be relieved. It may fairly be said that he urges but one reason for the modification in question, and that is that, since the divorce, his wife has remarried. There is no substantial evidence whatever that conditions have otherwise substantially changed since the divorce was granted. It fairly appears from the record that, though the alimony provision in terms includes both the plaintiff and the minor child, the parties understood it to be a provision for that child only. We would be very loath to hold that, when this father became divorced from this mother, that he also became divorced from the child that he had brought into the world. We should make such a pronouncement only if the law imperatively compelled it. We conclude, on the contrary, that the law demands we shall not cancel this obligation for the support of this child merely because the mother has remarried. For aught that appears in this record, the child might starve, so far as either the willingness or ability of the stepfather to support it is concerned. As said, there can be no reversal, unless the naked fact of the remarriage is a sufficient ground for reversing. Whatever may have been the state of the law in the past, it is settled in this jurisdiction, and rightly, that the remarriage alone affords no ground for such a modification as is here sought. It seems to us that the many cases requiring proof of a change in financial ability are, in themselves, sufficient to sustain that conclusion. But we think it is expressly sustained in *Daniels v. Daniels*, 145 Iowa 422.

In view of the conclusion reached, we have no occasion

to pass upon the objection made by appellee, that this proceeding should have been instituted by supplemental petition, rather than by motion. See *Schlarb v. Schlarb*, 168 Iowa 364, at 371. We are fully satisfied that the order below is right, and it is—*Affirmed*.

WEAVER, C. J., EVANS and PRESTON, JJ., concur.

EMMA HOOVER, Appellee, v. CENTRAL IOWA FUEL COMPANY
et al., Appellees; ESTHER MAY HOOVER, Intervener,
Appellant.

MASTER AND SERVANT: Workmen's Compensation Act—Ap-
1 **peal.** Statutes authorizing appeals apply to causes arising be-
fore and pending at the time of the enactment.

CERTIORARI: Appeal as Excluding Certiorari. The court will not
2 determine the correctness of certiorari proceedings, dismissed
by the lower court on the merits, when a properly taken appeal
is pending, involving the same questions.

MASTER AND SERVANT: Workmen's Compensation Act—Child
3 **with Stepfather Not Dependent of Natural Parent.** A child un-
der 16 years of age who has a stepfather may not recover under
the Workmen's Compensation Act for the death of the natural
parent.

Appeal from Lucas District Court.—D. M. ANDERSON,
Judge.

APRIL 6, 1920.

THE tribunals below held that appellee Emma Hoover, the mother of a deceased employee, was entitled to compensation under the act; also, that intervener Esther May Hoover, a minor child of said employee, and less than 16 years old, was not entitled to recover as a dependent, because, while the deceased employee was her father, at the

time of his death intervenor was a member of the family of her stepfather. Hence, intervenor appeals.—*Affirmed.*

John T. Clarkson, for appellant.

John F. Abegglen, D. W. Bates, and Stipp, Perry, Banister & Starzinger, for appellees.

SALINGER, J.—I. Appellant, on the 11th of June, 1907, appealed from the finding of the industrial commissioner to the district court. Her appeal was there dismissed. This was done on the theory that the then existing statute law authorized no appeal. We think this holding rests on a misapprehension, and may have been worked by following a suggestion made in the argument of appellee, to the effect that the statute permitting such appeal was "enacted" since this cause of action arose. That may be so; but Chapter 270, Acts of the Thirty-seventh General Assembly, became effective by publication before this appeal was perfected, and, in our opinion, sustains the right to the appeal which the court dismissed.

1-a

Appellant also brought certiorari in the district court, and in that proceeding asserted that the industrial commissioner was acting beyond power, in revising the decision of the arbitration committee, in whole or in part. It was urged by the defendant in the certiorari proceedings that the court had no power to entertain them. The court held to the contrary, but did so on the ground that it had jurisdiction because appeal did not lie. On the merits, the writ was annulled, the court holding that, in such revision the commissioner was not acting beyond power. We agree to this conclusion. We express no opinion on whether certiorari will lie merely because appeal is not permitted.

1. MASTER AND
SERVANT:
Workmen's
Compensation
Act: appeal.

2. CERTIORARI: ap-
peal as exclud-
ing certiorari.

Since we hold that appeal does lie, and since the cause is here on appeal, and since that appeal presents every question involved in the certiorari proceedings, we shall not pass further than we have done upon whether the action taken below in the certiorari proceedings was the proper one.

II. It may be conceded, for the sake of argument, that cases in other jurisdictions, upon which the commissioner relied largely, are not applicable, because of a difference in statutes. It may further so be conceded

2. MASTER AND
SERVANT: Work-
men's Compens-
ation Act:
child with
stepfather not
dependent of
natural parent.

that, if a child may not recover as a dependent of her father, because she has a stepfather, it is possible there will be cases where justice fails. We may so assume that, in some circumstances, our Compensation Act makes it possible that a claimant may have more than one recovery. We may so assume, for the appellee, that double dependencies should not be permitted. But, after all, we must be controlled by an interpretation of our own statute. The legislature has power to permit a double dependency. On the other hand, it may refrain from entitling anyone to compensation for the death of an injured employee. The sole question is, What has the legislature done? One provision of Section 2477-m16, Code Supplement, 1913, is that a child under 16 years of age is conclusively presumed to be wholly dependent upon a deceased employee, "whether actually dependent for support or not upon the parent at the time of his or her death." So far, such child is such dependent of an employee, provided he be "the parent" of such child. And so far, the statute attempts no definition of who such "parent" is. Up to this point, the reasonable construction of the statute is merely that, if the natural parent of a child younger than 16 is injured in the course of his employment, the recovery of such child cannot be contested on the ground that, in fact, she is not dependent upon such parent. With a deceased father, dead from injuries so sus-

tained, such child recovers, under the act. At this point, the conflict between the parties begins. The appellant says the liability is not affected by the existence of a stepfather, because the statute does not except cases where the child also has a stepfather. The appellees say the statute, as written, speaks of natural parents only, and that a child who has lost such parent in an industrial accident may not recover, if it have a stepfather, unless the statute says there is a right to recover though there is a stepfather. In our opinion, the statute, in so far as it has yet been adverted to, contemplates the usual only. Most children do not have a living parent and also a stepfather. Up to the point yet discussed, the statute does nothing except to provide for the cases where the child loses its "parent," and does not have a stepparent. But that is not all of the statute. It further provides that "stepparents shall be regarded in this act as parents." Reading the provisions together, we conclude that this last clause does work the exception which, according to appellant, is necessary to defeat her. The first provision leaves the right to recover on account of the death of a "parent." The second one necessarily deals with cases where there is a stepfather. It does so by declaring that, for the purposes of the act, the stepparent is the parent. There is nowhere an indication that anyone can have more than one set of "parents." There is no need for construction if the *natural* parent was injured. The sole purpose of the last and qualifying clause, then, must be to enact that, as between stepfather and natural father, the infant can recover for nothing but an injury to the stepfather. We find it impossible to interpret a statute which provides a recovery for the death of a parent, and expressly declares that, for the purposes of administering the statute, stepparents, if they exist, shall be deemed to be the parents, into meaning, not that stepparent becomes a substitute for parent, but that the child may recover on account of injuries to

either the natural parent, the stepparent, or to both. The statute substitution is idle if there may be recovery for injury to one for whom the statute substitutes another. All substitutions are, of necessity, exclusive. We find nothing in Subdivisions "d" and "f" of Section 2477-m9 which is repugnant to the said conclusion we have reached. It follows the decree must be—*Affirmed*.

WEAVER, C. J., EVANS and PRESTON, JJ., concur.

ISAAC & COMPANY, Appellant, v. J. R. LINDSEY & COMPANY,
Appellee.

BILLS AND NOTES: Nonnegotiable Sight Draft—Defenses. One

- 1 who, in one and the same transaction, and as an accommodation, assumes the position of purchaser of goods from the real owner, and the seller to a third party, and accepts in payment the nonnegotiable sight draft of such party, is subject, in an action on the draft, to the defense of total failure of consideration.

PRINCIPAL AND AGENT: Authority of Agent—Borrowing Money.

- 2 Principle recognized that the power in an agent to borrow money on behalf of his principal will be found only on an exceptionally clear showing of such power.

APPEAL AND ERROR: Harmless Error—Rejection of Evidence of

- 3 Established Fact. Harmless error results from the rejection of depositions tending to prove an established and conceded fact.

Appeal from Pottawattamie District Court.—O. D.

WHEELER, Judge.

APRIL 6, 1920.

ACTION at law upon a sight draft drawn on the defendant and delivered to plaintiff by the alleged agent of the defendant, the same being for money paid by the plaintiff to a third party for the alleged use of the defendant, and at the

request of the alleged agent. The defense was that the agent had no authority to draw the draft or to deliver the same to the plaintiff; that the money paid by the plaintiff to said third party was so paid pursuant to false and fraudulent representations made by such third party, and that the defendant received no benefit or consideration therefrom whatever. There was a trial to the court without a jury, and judgment for the defendant. Plaintiff appeals.—*Affirmed.*

George H. Mayne and Hainer, Craft & Edgerton, for appellant.

Tinley, Mitchell, Pryor & Ross, for appellee.

EVANS, J.—I. The respective briefs of the parties are in dispute as to whether this is an action on the sight draft or an action for money paid to the use of the defendant.

The petition will bear construction either way. Ordinarily, therefore, we should solve doubts of construction in support of the judgment below. This is doubly true as against the pleader. In our view of the case, however, we do not think such question controlling, as we shall presently see. The plaintiff is a partnership, engaged in the butcher business, at Aurora, Nebraska. The defendant also is a partnership, engaged in the business of buying and selling hides, wool, and furs. Pace, the agent, was in the employ of defendant, and was engaged primarily in buying hides and wool. This was the particular field of his experience. He was not experienced in the buying of furs, but we shall assume that the scope of his agency in this respect was co-extensive with the lines of the business of his principal.

Stating the facts briefly, as testified to by the plaintiff Isaac, Pace appeared at his shop on December 26, 1917, as

the traveling representative of the defendant, and purchased from the plaintiff its stock of hides. During the same day, and while Pace was still in the town, a stranger appeared at plaintiff's shop, with a quantity of furs for sale. He gave his name as Hughes. Plaintiff declined to purchase the furs, but advised Hughes that there was a traveling hide-man in town. Shortly thereafter, he pointed out Pace to Hughes, as Pace was coming into the shop. Pace and Hughes entered into negotiations, which resulted in the purchase by Pace from Hughes of furs, to the amount of \$355. The skins consisted of wolf, coon, badger, possum, skunk, etc. Hughes represented that he had trapped the animals near his home in the same county, about 13 miles distant from Aurora. Pace was furnished by his principal with a form of sight draft, which he was authorized to use in payment for goods purchased. It was not negotiable in form. It had attached thereto an invoice coupon, wherein an invoice of goods purchased was to be set forth. This invoice was to be duly signed, and payment therefor duly receipted by the seller. On the face of the draft appeared the following printed warning:

"Draft not good unless coupon invoice attached is properly signed, and in payment for goods in our line."

Hughes insisting upon cash payment, the plaintiff advanced the amount necessary to pay for the furs.

This is the foundation of plaintiff's alleged cause of action, whether it be based upon the draft issued to it by Pace, or upon the fact that money was thus paid at the request of Pace. It should, perhaps, be noted at this point that Pace testified that he had not even requested such payment by plaintiff, but that the plaintiff volunteered such advancement, and its offer was acquiesced in by Pace. If this latter fact should be deemed material (and we think it is not), we should have to accept the statement of Pace, in support of the finding of facts by the trial court.

Upon this state of facts, the method of reimbursement of the plaintiff might have taken any one of four or more forms.

(1) The plaintiff might have stood in the position of a lender of the money.

(2) It could have stood in the position of having paid money at the request of Pace, to the use and benefit of the defendant.

(3) Pace could have issued to Hughes his usual form of sight draft, with invoice attached, appropriately signed and receipted by Hughes, which draft could have been transferred by Hughes to plaintiff.

(4) It could, with the consent of Hughes and Pace, have made itself the purchaser of the furs from Hughes, and the seller of the same to the defendant.

If plaintiff had stood upon the first hypothesis above, and had proved the authority of Pace to borrow money upon the credit of his principal, then it would be entitled to recovery, regardless of any defense which such principal had as against Hughes. But the burden of proof of authority in Pace would have been upon the plaintiff, and this record indicates that such proof could not have been made.

If it had stood upon the second hypothesis, and had proved that the defendant did accept the benefit to the procurement of which plaintiff's money had been paid, we may assume that this would have been a sufficient ground of recovery. But the burden of proof of acceptance of benefits, as in the nature of ratification of an act of agency, would, in such case, be upon the plaintiff. Such proof would necessarily negative the very defense upon which defendant successfully stood in the trial court.

If it had stood upon the third hypothesis, it would have found itself a holder of nonnegotiable paper. Its rights thereunder would be subject to any defense good against

Hughes. In such event, therefore, it would have had to meet the same defense as it has met.

The fourth hypothesis was the one actually adopted. The plaintiff treated itself as the seller of the furs, and accepted from Pace a sight draft upon the defendant, and signed and receipted the invoice attached thereto, as the purported seller of the goods described in the invoice. It thereby made itself subject to the defense set up, in so far, at least, as such defense is based upon a total want or failure of consideration, in that the furs were, in fact, totally worthless.

The finding of the trial court in this regard was purely a finding of fact, and has abundant support in the evidence.

It is manifestly true that plaintiff was not guilty of any intentional fraud. It put itself, however, in a false position, which, as between it and the defendant, it was not justified in doing, when, for the purpose of collecting the draft from the defendant, it represented itself as seller of the furs.

It is manifest that, of the hypotheses above stated, only the first would open a door of escape to plaintiff from the defense, good against Hughes, that was set up by defendant.

But the scope of the authority of Pace to pledge the credit of his principal was clearly restricted in the form of the sight draft used by him. No fact appears in the record from which the power to borrow money on the credit of his principal could be implied. Indeed, it is well settled, as a cardinal rule, that the power of an agent to borrow money upon the credit of his principal will not be readily implied. Authority to borrow money or to execute negotiable paper in the name of his principal is regarded in law as one of the most dangerous powers which may be conferred upon an agent. The granting of such authority implies a special and high degree of confidence, and, in the ab-

2. PRINCIPAL AND
AGENT: au-
thority of
agent: bor-
rowing money.

sence of express proof, will not be implied, unless it be a necessary and inevitable inference from the very nature of the agency created. 1 Mechem on Agency (2d Ed.), Section 1001.

If this were an action against Pace himself, a very different question would be presented. But the defendant rejected the furs, as the purported benefits, and returned the same immediately to plaintiff, with notice of their rejection. Plaintiff held its cause of action, therefore, subject to the defense set up by defendant. The finding of the trial court has the effect of a verdict, and is well supported by the evidence. We cannot, therefore, interfere with it.

II. Error is assigned on adverse rulings of the court, rejecting certain testimony offered by deposition on behalf of plaintiff, to the effect that the usual custom in the hide and fur trade was for traveling agents to make payment by the issuance of sight drafts upon their principals, in precisely the form of draft used in this case. We see no occasion for the proof. If it had been admitted, it would add nothing to the record which does not already appear there without dispute. Whether the form of evidence was objectionable, therefore, we need not inquire. The judgment below must be—*Affirmed*.

3. APPEAL AND
ERROR: harm-
less error: re-
jection of evi-
dence of es-
tablished fact.

WEAVER, C. J., PRESTON and SALINGER, JJ., concur.

TEDDY SHEA, Appellee, v. BIDDLE IMPROVEMENT COMPANY,
Appellant.

EVIDENCE: Documentary Evidence—Book of Original Entries. A
1 so-called loose-leaf ledger, showing, by timely entries, the various items of labor or materials and the separate charges therefor, and *intended*, at the time of making up, to constitute the permanent evidence of the charges, is admissible as a book of

original entries, even though made up from memorandum slips, which showed the various items of labor or materials, without charges attached thereto, and which were intended as temporary aids in making up the ledger, and not as permanent evidence of charges.

EVIDENCE: Book of Original Entries—Timely Entries. Evidence 2 reviewed, and held to show that entries in books of original entry were timely.

TRIAL: Erroneous Instruction Eliminated by Jury Findings. An 3 erroneous instruction is without prejudice, when it affirmatively appears that the findings of the jury wholly eliminate the hypothesis upon which the erroneous instruction was given. So held where the instruction was erroneous because not applicable to the pleadings, and because wrongly placing the burden of proof.

Appeal from Polk District Court.—GEORGE A. WILSON,
Judge.

APRIL 6, 1920.

ACTION at law to recover for labor performed and material furnished pursuant to a contract. The answer was, in legal effect, a general denial. There was a trial to a jury, and a verdict for the plaintiff for the full amount of his claim. Judgment was rendered thereon, and defendant appeals.—*Affirmed.*

H. L. Bump, for appellant.

C. C. Putnam and *Judson C. Piper*, for appellee.

EVANS, J.—At the time of the transactions under consideration, the plaintiff was a plumber, engaged in business for many years in the city of Des Moines. The defendant was a corporation, organized for the purpose of acquiring a long-time lease on a certain city property on Second Street and Grand Avenue in Des Moines. For the purpose of improving such property, so as to increase the rental value thereof, it constructed thereon 14 store fronts. Plaintiff

was employed to do the plumbing. The negotiations with the plaintiff were carried on in advance of the actual organization of the defendant corporation by the individuals who organized it. The contract was oral. It provided that the plaintiff was to do all the work for the actual cost of the labor, plus 20 per cent, and to furnish all of the material for the actual cost of the same, plus 10 per cent. This feature of the contract is admitted by the defendant's representatives, as witnesses. They testified, however, that the plaintiff agreed that the maximum cost should not exceed \$1,000, which contention was denied by plaintiff as a witness. This difference presents the only conflict in the evidence at the trial. There was, however, no admission of any part of plaintiff's account, further than that the defendant pleaded a payment of \$700, which was admitted by the plaintiff.

Two errors are assigned by appellant as grounds of reversal, and we proceed to their consideration.

I. The first error relates to the admissibility in evidence of plaintiff's books of account.

Plaintiff attached to his petition an itemized statement of all the material furnished by him, including the actual cost of each item, and an itemized statement of all the labor performed, including the name of the laborer and number of hours of labor performed by him at a stated time. In support of his petition, he put in evidence, over the objection of the defendant, his account book, wherein the same itemization appeared as was set forth in his petition. The objection to the book was that the entries therein were not original entries, and, therefore, it was not a book of original entries. This objection was predicated upon the fact, testified to by plaintiff, that every item of material delivered by him upon the premises was first entered upon memorandum slips; and also that the

1. EVIDENCE:
documentary
evidence: book
of original
entries.

time of each laborer was first entered in hours upon memorandum slips, either by the laborer or by the plaintiff himself, who was personally engaged in labor upon the job. The argument is that the memoranda upon the slips constituted the original entries, and that the slips themselves were the only admissible evidence thereof. The plaintiff's only account book kept by him was what is called a loose-leaf ledger. He used the slips for the purpose of making immediate memoranda upon the ground. These memoranda consisted of the items of material and of the hours of time of each laborer. No prices were written upon any of them. The plaintiff was his own bookkeeper.

2. EVIDENCE:
book of original
entries: timely
entries.

er. The memoranda were made during the daytime, in the progress of the work. The day's charges were then made by plaintiff "that night, or maybe the next night, and then I do work on my books on Sundays or Saturday afternoons." This was a sufficient showing that the charges "were made at or near the time of the transactions" therein entered. The entries were all in the handwriting of the plaintiff. He testified to their correctness.

Section 4623, Code, 1897, is as follows:

"Sec. 4623. Books of account containing charges by one party against the other, made in the ordinary course of business, are receivable in evidence only under the following circumstances, subject to all just exceptions as to their credibility:

"1. They must show a continuous dealing with persons generally, or several items of charge at different times against the other party in the same book or set of books;

"2. It must be shown by the party's oath, or otherwise, that they are his books of original entries;

"3. It must be shown in like manner that the charges were made at or near the time of the transactions therein

entered, unless satisfactory reasons appear for not making such proof;

"4. The charges must also be verified by the party or clerk who made the entries, to the effect that they believe them just and true, or a sufficient reason must be given why such verification is not made."

All the requirements of this statute were substantially met in the showing, unless it be that the existence of the slips and the memoranda thereon, impeached or supplanted the account book as a book of *original* entries. The argument for appellant is that the memorandum slips were the original entries, and that, therefore, there could be no subsequent original entries. Whether these memoranda constituted the original entries, within the meaning of the statute, depends, in part, upon whether they were intended as such by the plaintiff, when made. An original entry, within the meaning of the statute, is one which is intended, when made, to be the permanent evidence of the charge. If no memoranda had been made upon the slips, would the plaintiff's books be better evidence than they are? Appellant's argument would make them such. If the slips and the memoranda thereon were, at the time of their use, intended only as a temporary aid to the entering of the charges upon the book of original entries, they cannot be deemed thereby to supplant the book as one of original entries, nor to impair its credibility; provided, of course, that the entries in the book were made at or near the time of the transactions, and by one who had actual knowledge and memory of the transaction, at the time of the entry.

It will be noted, also, that Section 4623 has reference to entries of "charges." No prices were entered and no "charges" actually made upon the memorandum slips. The statute also purports to deal, not with mere "original entries," but with "books of original entries." True, we have held that slips containing original entries may be deemed books

of account, within the meaning of the statute. *Emeny Auto Co. v. Meiderhauser*, 175 Iowa 220. But that depends, also, as already indicated, upon whether they were intended as such when they were made. Of course, no book of original entries is conclusive. Its credibility is always open to attack. Even though it sufficiently comply with Section 4623 to be admissible in evidence, yet the actual method of the particular entries may be inquired into and considered on the question of credibility.

That the memoranda involved in this case were intended as mere temporary aid in the making of a multitude of entries upon the book of original entries, is sufficiently shown. We hold, therefore, that the book was admissible, as one of original entries. Its credibility is not otherwise assailed. Nor are the items appearing therein in any manner contradicted. The items are all of such a nature that, if untrue, they were subject to contradiction by mere observation upon the job. Any experienced plumber could invoice the items of material entering into the job done by the plaintiff.

II. The second error complained of is directed to Instruction No. 2, given by the court to the jury. This was as follows:

“The defendant contends that there was an oral agreement entered into between the plaintiff and defendant, by virtue of which plaintiff was to furnish material and labor for plumbing said buildings, located at or near Second Street and between Locust Street and Grand Avenue, and that the defendant was to pay the plaintiff the cost of material used, plus 10 per cent, and the cost of labor, plus 20 per cent, and that the plaintiff agreed that, in no event, the total costs of labor and material would exceed the sum of \$1,000. That the plaintiff has performed the services, and that this defendant has paid plaintiff on

3. TRIAL: erroneous instruction eliminated by jury findings.

said contract the sum of \$700, leaving a balance yet due the plaintiff from the defendant in the sum of \$300. Now, as to the above, the burden of proof is upon the defendant to establish the same by a preponderance of the evidence, and if you find that the defendant has so established the above to be the agreement made between the parties, then the plaintiff, under the issues, will be entitled to a verdict at your hands, on account of material and labor furnished and performed on account of said contract, in the sum of \$300."

It will be noted from a perusal of the foregoing that the court lifted the burden of proof from the plaintiff to prove his account. If the jury should find that he had agreed upon a maximum cost of \$1,000, in that event the jury was instructed to return a verdict for him for \$300. This is the feature of the instruction complained of. It was manifestly erroneous. It was doubtless predicated upon a misconception of defendant's pleading.

What prejudice could the defendant have suffered therefrom? If the jury had found that the plaintiff did limit his charges to a maximum cost of \$1,000, and had returned a verdict for the plaintiff for \$300, the defendant would have been in a position to complain of this instruction.

The total cost of the job, as pleaded by plaintiff, and as his evidence tended to prove, was \$2,147, with \$700 paid thereon. In the first instruction, the court laid upon the plaintiff the full burden of proof as to the entire account. The jury returned a verdict for \$1,447. They necessarily found that there was no agreement by plaintiff for a maximum cost of \$1,000. Such finding eliminated entirely the hypothesis upon which the jury was directed, by Instruction No. 2, to return a verdict for \$300. The error was, therefore, clearly without prejudice. No other errors are presented for our consideration. The judgment below is, accordingly,—*Affirmed*.

WEAVER, C. J., PRESTON and SALINGER, JJ., concur.

STATE OF IOWA, Appellee, v. CONSOLIDATED INDEPENDENT
SCHOOL DISTRICT OF PAJO et al., Appellants.

APPEAL AND ERROR: Dissolution of School District. An appeal
1 from an order of court dissolving a school district organization
is not triable *de novo*.

ELECTIONS: Erasure of Ballot Mark. A ballot will be treated as
2 blank when the voting mark is almost completely erased.

APPEAL AND ERROR: Points Presentable by Nonappellant. An
3 appellee, *without presentation of error points*, may show, if he
can, that he was so erred against as to entirely neutralize any
errors against appellant. So held in an election contest.

Appeal from Linn District Court.—MILO P. SMITH, Judge.

APRIL 6, 1920.

THE trial court dissolved said district. The question is
whether, upon the consideration of such ballots as were
legal, there was, in fact, a majority for dissolution.—*Re-*
versed.

Voris & Haas, for appellants.

C. W. Meek, Treichler & Treichler, and *E. A. Johnson*,
for appellee.

SALINGER, J.—I. Whether the district has been law-
fully dissolved can be decided here only upon what is, in a
sense, a recount. In making such recount, we must pro-

ceed under the following limitations: (a)

1. **APPEAL AND
ERROR:** dis-
solution of
school district.

The review is not *de novo*. (b) Where the
question whether a mark constitutes an ob-
jectionable identification is a doubtful ques-

tion, the finding below on that point has the standing of a
verdict. (c) The successful party may, without appealing
or assigning errors, save the judgment by showing that er-

rors were committed against him below which, if corrected, will make the result reached below a right result. *Voorhees v. Arnold*, 108 Iowa 77. And see *Kelso v. Wright*, 110 Iowa 560, at 565; *Royer v. King's Crown Plaster Co.*, 147 Iowa 277, 281; *Eisentrager v. Great Northern R. Co.*, 178 Iowa 713, at 720; *Ford v. Dilley*, 174 Iowa 243, at 247; *Campbell v. Park*, 128 Iowa 181.

II. We have the ballots certified to us. One ballot indicates that, at one time, a mark against dissolution was made thereon. That mark is almost completely erased. We think it should not be counted either way.

2. ELECTIONS:
erasure of bal-
lot mark.

Eighty-six ballots were cast for dissolution. Appellant contends the court should have excluded eight of these, designated in the record as Exhibits A, B, C, D, E, G, H, and I. We have examined these ballots, and, for a reason presently to be stated, and, indeed, on the merits, we will assume that we are not justified in interfering with the finding made by the trial court that they should be counted. This makes it unnecessary to deal with practice points urged by appellee. So far, the tally for dissolution stands 86. Exhibits 4-c and 4-d are 2 ballots cast against dissolution which the court rejected for having objectionable identification marks. We are constrained to hold that these 2 ballots are no more objectionable on that score than several of the 8 which the court counted. And we hold that, under *Voorhees v. Arnold*, 108 Iowa 77, we must count these 2 ballots, on the merits. With 90 others cast against dissolution, the tally against dissolution then stands at 92. If, then, the judgment that the district has been dissolved may stand, the warrant for sustaining the same must be found in something not yet spoken to.

3. APPEAL AND
ERROR: points
presentable by
nonappellant.

The appellee concedes that 86 votes are the maximum cast in favor of dissolution. Appellant contends that the

vote of Martin G. Clark should have been deducted. If we hold against this contention, the vote for dissolution remains 86. We have found that, on the face of the returns, the vote against dissolution totaled 92. The appellee contends the court rightly excluded the following ballots, cast against dissolution: Schnell, Bears, Ed. Kreutzer, William Kreutzer, John Henry Kreutzer, and J. J. Kocher. Suppose we held there was no error in rejecting these ballots. That would make the total against dissolution 86. Having now assumed that every challenge made by appellants, either as to reception or exclusion, is not well taken, yet the vote is a tie. It follows the trial court erred in holding that the district had been dissolved by the vote at the election, and its judgment must, therefore, be reversed.—*Reversed.*

WEAVER, C. J., EVANS and PRESTON, JJ., concur.

J. J. THOMAS, Appellee, v. FRANK WILLIAMS, Appellant,
et al., Appellees.

CONTRACTS: Certainty—"Equal Share." Contract relative to
1 the sale of land by parents to a son construed, and held that
a clause, "after our day each one gets equal share," referred
to *all* grantor's children, and not to three children only.

CONTRACTS: Consideration. An agreement by a vendee to pay
2 an existing mortgage on the land, "as part of the consideration,"
very definitely points to the conclusion that payment of such
mortgage works a payment *pro tanto* of the purchase price.

CONTRACTS: Understanding of Parties. What the direct bene-
3 ficiaries of an ambiguous contract understood it to mean is
persuasive on the issue of construction.

Appeal from Montgomery District Court.—J. B. ROCKAFEL-
LOW, Judge.

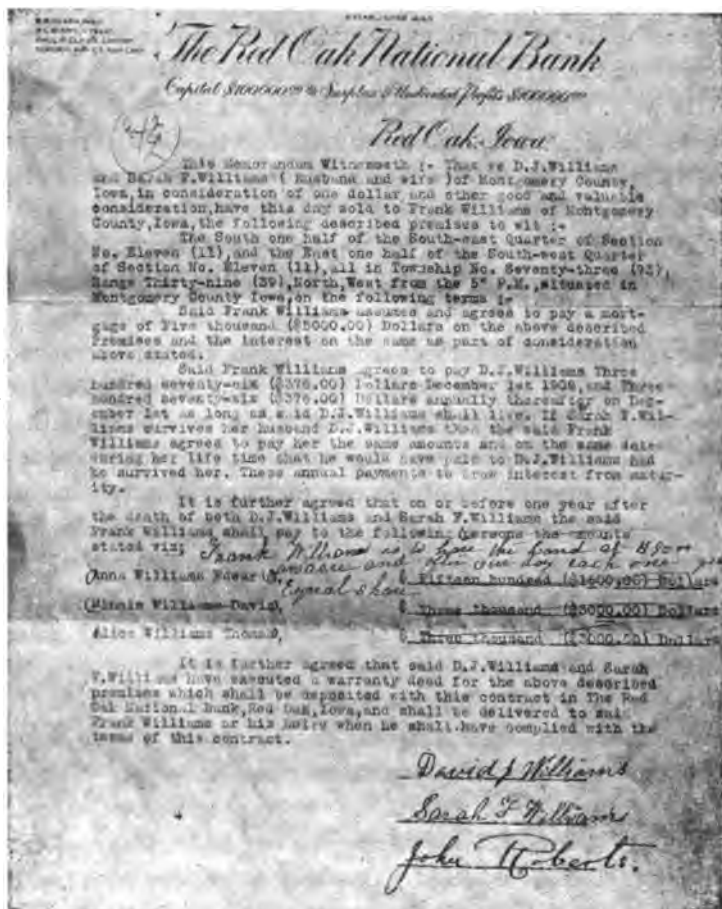
APRIL 6, 1920.

ORIGINALLY, this was an action of partition. Later, it became, in fact, an action to construe a contract, and to determine the ultimate rights of the parties thereunder. The decree construed the contract in accord with plaintiff's contention, and the defendants have appealed.—*Reversed.*

Paul W. Richards, for appellant.

W. O. Ratcliff and George W. Thomas, for appellee.

EVANS, J.—The controversy, in its final form, involves the distribution of the proceeds of the sale of a farm of 160 acres. David J. Williams, the owner of the farm, and Sarah, his wife, executed a contract of sale
1. CONTRACTS: of said farm to their son, Frank Williams.
certainty:
"equal share." Provision was made therein for annual pay-
ments to be made to the grantor and wife during their lives, and for a distribution of the purchase price thereafter. The proposed contract, as first drafted, was materially changed by interlineation and erasures, which rendered the contract, as executed, ambiguous, at least, in some respects, if not quite uncertain. The following is a photographic copy of the contract, as executed:



The contract was executed sometime in 1908. The children of David Williams and wife consisted of three daughters and one son, as follows: Anna (Mrs. Edwards); Minnie (Mrs. Davis), Alice (Mrs. Thomas), and Frank. The fact of the execution of the contract was known to all members of the family, and never complained of by any. Frank was in possession of the farm, as a renter, at the

time of the execution of the contract, and for some time before. He went into possession thereof, pursuant to the contract, January 1, 1909. David died in December, 1910. His wife, Sarah, survived him and still survives, and is a party herein. Sometime after the execution of the contract, a judgment was entered against David J. Williams in Mills County for approximately \$3,500. In 1911, a transcript of this judgment was filed in Montgomery County, where the farm in question is located. Though the contract recites that a warranty deed has been executed and deposited for the purpose of delivery to Frank, upon his performance of the conditions of the contract, yet none was, in fact, executed during the lifetime of David. After his death, however, the three sisters and the mother all executed deeds to Frank, in recognition of the contract and in purported performance thereof. The only consideration exacted for such deeds was the future performance of the contract by Frank according to the terms thereof. In 1913, Alice (Mrs. Thomas) died, leaving her husband surviving, and two minor children. Her surviving husband is plaintiff herein. The defendant Frank Williams paid the \$3,500 judgment. His right to contribution therefor to the extent of one fourth thereof from each of his sisters is not disputed. The disputed contention of plaintiff is stated as follows:

"(1) The \$5,000 mortgage was not to be deducted from the purchase price of \$14,400, which is \$90 per acre for 160 acres, but was assumed by the appellant, and to be paid by him in excess of the purchase price of \$90 per acre.

"(2) The three daughters only, and not the four children, were to share in the \$90 per acre."

These propositions are both resisted by the defendant Frank Williams, his contention being:

(1) That \$90 per acre was the full amount of the purchase price agreed on as a consideration; that he assumed the \$5,000 mortgage "as part of consideration;" that the

payment of such mortgage amounted to a payment *pro tanto* of the agreed price.

(2) That the clause of the written interlineation, "after our day each one gets equal share," relates to the distribution of the remaining proceeds of the purchase price among the children of the grantors; and that the words "each one" refer to the four children, and not to three.

The decree of the trial court sustained both of the propositions contended for by plaintiff. We turn, therefore, to a construction of the contract. It is made to appear that, prior to the execution of the contract, someone had drafted a typewritten form for them. This proved to be unsatisfactory, in that it did not express the purpose or wish of the grantors. They undertook, however, to utilize such drafted form in part by making erasures thereon, and inserting a written interlineation therein. This interlineation introduced certainty into the contract in one respect and uncertainty in another. It did fix definitely the price of the land which was to be taken as the basis of computation. The words "each one," as descriptive of the beneficiaries of the distribution, involve uncertainty in their application. Whether the uncertainty is such as to render the use of the term and its clause ineffective for any purpose, or whether it should be deemed such an ambiguity as may be aided and explained by extraneous evidence, might be an interesting question to consider. The conclusion which we reach renders it unnecessary that we should make the differentiation. If the clause "each one gets equal share" is to be deemed so uncertain as to be wholly ineffective, then there is no provision in the contract for the distribution of the purchase price. It would, therefore, fall into the estate of the intestate decedent. The four children, as the only heirs, would become equal beneficiaries thereof. On the other hand, if such clause, in the light of the surrounding circumstances attending the contract,

presents such ambiguity as opens the door to extraneous evidence, then the same result must be reached. As will be noted later, the extraneous evidence introduced shows that the words "each one" had reference to all the heirs of the grantors, being their four children.

As an aid to the construction of the contract as executed, we may look first to the drafted typewritten form, as originally drawn. We note first that it omitted to state the purchase price. It furnished, therefore, no basis of computation for the purpose of a division. It did fix specific amounts to be paid to each of the three sisters. Assuming that the actual value of the land was \$90 per acre, as the undisputed evidence in this record shows it to have been, then the practical result of the contract, if it had been executed in the drafted form, would have been to require Frank to pay to his sisters \$7,500, and no more, and to permit him to retain for himself a balance of \$1,900 over and above the \$5,000 mortgage. Treating such proceeds of the sale as the total estate of the decedent, Frank would be a beneficiary in such estate to the extent of \$1,900; whereas one of his sisters would receive \$1,500, and the other two would receive \$3,000 each. This is the basis of the contention of appellant that the intent of the grantors by the interlineation was to make all their children equal beneficiaries in their estate. The argument for appellee is that the words "each one" should be construed as referring to the three daughters, because their names still remain in the contract, unerased. And yet, they are completely detached from all that precedes and from all that follows. The erasure began with the words, "persons the amounts," and ended with the words, "Three Thousand Dollars." There is a line drawn partially through one of the names. They are also included in parentheses. Whether this was for the purpose of cutting them out or of keeping them in is a matter of mere surmise. They form no part

of any sentence or statement in the contract, as executed. They are disconnected from any predicate, and are themselves neither subject nor object of any verb. If the words "each one" should be construed to refer to persons whose names appear in some form in the contract, the fact remains that the names of the four children appear therein. The contract, however, does not disclose that the persons so named are the children of the grantors. This fact is made to appear only by extraneous evidence. In the final form of the contract, as executed, we observe no reason for saying that the words "each one" should refer to three of the children, rather than to four.

On the question whether Frank assumed the \$5,000 mortgage, in addition to the contract price, the language of the contract is definite and certain. He assumed the same "as part of consideration above stated." The only consideration above stated is the written interlineation: "Frank Williams is to have the land at \$90.00 an acre."

The construction of the contract here foreshadowed is strongly sustained by the extraneous evidence introduced. The widow, Sarah, and the daughters, Anna and Minnie, were made parties defendant. They appeared in person, but filed no pleading. Each of them was examined as a witness on behalf of the defendant Frank. They had all

understood the contract in accordance with the construction contended for by Frank. It was Mrs. Williams who made the erasures and the interlineation in the contract. She testified that "each one" in such interlineation referred to the four children. She testified, also, that the actual value of the land was \$90 an acre, and that such was the price at which her husband was holding it before it was offered to Frank. This testimony as to actual value is not disputed. Minnie testified as follows:

"I first saw the agreement today, but my mother has told me about it, before my father's death. She told me they had sold the farm at \$90 an acre to Frank, and it was equally divided among the four of us. * * * It was my understanding that I should receive what would be due me under the contract, Exhibit 2, after taking out the mortgage and the judgment that had been paid. The judgment and mortgage should be deducted, and then the balance distributed at \$90 per acre according to contract, Exhibit 2."

The foregoing was, in substance, the understanding of the entire family, including Alice, who later died.

Upon the whole record, we readily reach the following conclusion:

1. That \$90 per acre was the actual value of the land, and was the full consideration contracted for.

2. That the \$5,000 mortgage was assumed as a part of such consideration.

3. That the remainder of the proceeds constituted what would have been the estate of decedent.

4. That such proceeds were necessarily subject to the \$3,500 judgment against the decedent.

5. That the true intent of the contract was to distribute the net proceeds of the estate, after the death of the surviving grantor, to the four children, as all the heirs of the grantor.

Decree will be ordered accordingly, and the decree entered below will be—*Reversed*.

WEAVER, C. J., PRESTON and SALINGER, JJ., concur.

L. E. TRAMP, Appellee, v. EVANS MARQUESEN, Appellant.

CORPORATIONS: *Illegal Stock Subscription.* A stock subscription, violative of a statute, in that the purchase price was fixed at less than par value, is non-enforceable.

Appeal from Audubon District Court.—E. B. WOODRUFF,
Judge.

APRIL 6, 1920.

SUIT to recover on a contract of subscription for corporate stock, the plaintiff being the assignee of the corporation. The defendant refused to take the stock, and refused to pay therefor. His principal defense is that the contract of subscription was violative of our statute and void. The trial court held, in substance, that such statutory provisions were for the public benefit only, and were not available to a party to the transaction, as a defense against the performance of his contract. Judgment was accordingly entered for the plaintiff, and defendant appeals.—*Reversed.*

Graham & Graham and *E. M. Willard*, for appellant.

H. M. Boorman and *Mantz & White*, for appellee.

EVANS, J.—I. The plaintiff was the owner of a brick and tile plant, located at Audubon. For the purpose of disposing of the same, he and defendant and others organized a corporation, for the purpose of taking over said tile plant. The plaintiff had put a price thereon of \$20,000. The capital stock of the corporation was fixed at \$100,000, divided into 1,000 shares, of a par value of \$100 each. Both plaintiff and defendant were more or less active in the promotion of the company. The contract of subscription with the defendant provided for the delivery of 30 shares to him for a subscription price of \$2,000. The plaintiff became the assignee of the subscription contract. The illegality urged by defendant as his defense is that the subscription price was fixed at less than par value, in violation of law, and that the contract was not, therefore, enforceable.

The particular sections of our statute which bear upon the question include the following:

"Sec. 1641-b. That from and after the passage of this act no corporation organized under the laws of the state of Iowa, except building and loan associations as defined and provided for in Chapter 13, Title IX of the Code, shall issue any capital stock or any certificate or certificates of shares of capital stock, or any substitute therefor, until the corporation has received the par value thereof. * * *"

"Sec. 1641-d. * * * The capital stock of any corporation issued in violation of the terms and provisions hereof shall be void, and in a suit brought by the attorney-general on behalf of the state of Iowa in any court having jurisdiction, a decree of cancellation shall be entered; and if the corporation has received any money or thing of value for the said stock, such money or thing of value shall be returned to the individual, firm, company or corporation from whom it was received, and if represented by labor or other service of intangible nature, the value thereof shall constitute a claim against the corporation issuing stock in exchange therefor."

"Sec. 1641-f. Any officer, agent, or representative of a corporation who violates any of the provisions hereof shall, upon conviction, be fined not less than \$200 nor more than \$1,000, and be imprisoned in the county jail for not less than 30 days nor more than 6 months."

If the foregoing statutes are to be deemed applicable, they are quite controlling of the question raised. Because of these sections, no one connected with the corporation could have authority to contract for the sale of its stock at less than par value. Manifestly, therefore, the defendant, as a stock subscriber, could never have enforced specific performance of the subscription contract. It would seem to follow, of logical necessity, that, if he could not legally enforce it, he could, at least, abandon it. As a basis for his action, the plaintiff, as assignee, pleaded that he had caused tender of the stock to be made to defendant before suit and

a demand of the contract price. If no one could have authority to make such a contract for the corporation, how could authority be had to tender performance of such a contract? What authority could anyone have to deliver, on behalf of the corporation, its stock at less than par value? These queries are only steps in the reasoning. They lead irresistibly to the final conclusion, not only that the defendant could not enforce the subscription contract, but that the same was not enforceable against him, either by the corporation or by its assignee. As between plaintiff and defendant, they were both promoters and *particeps criminis*. The law simply leaves them where they left themselves. *Sherman v. Smith*, 185 Iowa 654; *Thronson v. Universal Mfg. Co.*, 164 Wis. 44 (159 N. W. 575); *Lee v. Cameron*, (Okla.) 169 Pac. 17; *Minge v. Clark*, 190 Ala. 388 (67 So. 510).

Assuming, therefore, that the rights of the parties are governed by the sections of the statute above quoted, we are very clear that the contract sued on is not enforceable by either party thereto.

II. The sections of the statute which we have above quoted are, in terms, applicable to corporations organized under the laws of this state. The corporation under consideration, though organized in this state, and for the purpose of doing business at Audubon in this state, was organized, nevertheless, under the statutes of South Dakota. Neither party proved or pleaded the statutes of that state. Each claims in argument that the presumption must obtain that the statutes of the two states are alike, as regards the question at issue. We shall, therefore, so assume. Application for permit to do business in this state was made to and granted by the secretary of state, under the provisions of Code Section 1637 *et seq.* The application for permit was in the form of a resolution, and, pursuant to Section 1637, contained the following proviso:

"It being understood and hereby agreed that the certificate or permit, when issued, shall be subject to and subject this company to all the provisions of the statutes of Iowa, relating to organization for pecuniary profit."

The permit granted contained the same proviso.

Whether we regard the legality of the contract as one to be determined under the statutes of South Dakota, or under our own like statutes, the fact remains that the subscription contract entered into was illegal and void, under the statutes of both states.

The judgment below must, accordingly, be—*Reversed*.

WEAVER, C. J., PRESTON and SALINGER, JJ., concur.

SWAN J. WELANDER et al., Appellees, v. E. H. HOYT,
Treasurer of the State of Iowa, Appellant.

TAXATION: Tax Accrues on Death of Decedent—Effect of Subse-
1 **quent Treaty.** The right of the state to a collateral inheritance tax accrues,—becomes vested,—and the lien therefor attaches, immediately upon the death of decedent, even though, by grace of statute, the remainderman *may* defer the appraisal, computation, and actual payment until a day subsequent to his day of actual enjoyment. Such accrued right may not be affected by the subsequent adoption of a treaty giving foreign beneficiaries the rights possessed by citizens of the United States.

TAXATION: Collateral Inheritance Tax—Instant or Deferred Pay-
2 **ment.** A remainderman, charged with a collateral inheritance tax, may exercise either of two alternative rights in the payment of the tax, viz.: (1) He may, immediately upon the death of decedent or later, cause the property to be appraised, and pay on the *then* value; or (2) he may defer appraisal until he passes into actual enjoyment of the property, and pay on the *then* value.

Appeal from Montgomery District Court.—E. B. WOODRUFF, Judge.

APRIL 6, 1920.

ACTION against the treasurer of state to recover an excess charge made and collected upon a collateral inheritance or devise. The action is prosecuted under the provision of Section 1481-a43, Code Supplement, 1913. The trial court entered judgment for the excess, and the defendant has appealed.—*Reversed.*

H. M. Havner, Attorney General, *B. J. Powers*, Assistant Attorney General, and *Paul W. Richards*, County Attorney, for appellant.

Ralph Pringle, for appellees.

EVANS, J.—The estate involved is that of Nels Johnson, in Montgomery County. The decedent died testate, in 1905. By his will, he gave to his surviving widow a life estate in all his real estate, and one undivided half of the remainder to his own legal heirs, and the other undivided half thereof to the legal heirs of his widow. Only the interest of the legal heirs of Nels Johnson is involved herein. The surviving widow died in 1912, whereby the remaindermen came into full enjoyment of their estate. Thereupon, the tax appraisers appraised the real estate at its then market value, and a tax thereon was exacted at the statutory rate. The legal heirs of Nels Johnson were 19 in number. They were and are subjects of Sweden. Of these 19 heirs, 2 were related to the decedent as brother and sister. The other 17 heirs were more distantly related. Pursuant to our statute, the state treasurer exacted a tax of 10 per cent on the respective shares of the brother and sister, and of 20 per cent on the other shares. The excess

1. TAXATION: tax accrues on death of decedent: effect of subsequent treaty.

claimed is the amount over and above 5 per cent upon each share. This claim is predicated upon the terms of the treaty between the United States and the Kingdom of Sweden, which was duly ratified and promulgated in August, 1911. There is no dispute of fact in the case. The amount of the excess is not in dispute, if excess there be. The issue between the parties is wholly one of law, and is a narrow one. That the treaty is the paramount law is recognized by both parties. It is conceded that the state may not exact or assert a greater rate of tax than is permitted by said treaty. It is also conceded that the treaty does not operate retroactively. The specific question is: When did the liability of the devisees and their respective estates to the state for the inheritance tax first attach or accrue? Concededly, such liability accrued either at a time prior to August, 1911, or else it did not accrue until the death of the life tenant, in 1912. If the former, it antedated the treaty, and is not affected by its subsequent adoption. If the latter, the provisions of the treaty are controlling. Under these provisions, no greater tax may be exacted from subjects of Sweden than is exacted from citizens of the United States.

In *Prevost v. Grenneau, Treas.*, 60 U. S. 1 (15 L. Ed. 572), a kindred question came before the Supreme Court of the United States. In that case, a statutory inheritance tax had been collected by the state of Louisiana. In the absence of heirs, the entire estate passed into the possession of the surviving widow. No heir of the decedent appeared until after the death of such widow. In the meantime, a treaty with France had come into effect, under which the collateral heir claimed exemption from the tax. It was held that, under the statute of Louisiana in force at the time of the death of the decedent, the right of the state to the tax accrued, even though no effort had been made to collect the same. It was held that the treaty was not applicable.

In *Clapp v. Mason*, 94 U. S. 589, an analogous question came before the same court. That case involved a construction of the Collateral Inheritance Tax Act of Congress of June 30, 1864. The estate of the decedent passed first to a life tenant, who was exempt from such inheritance tax, and the remainder to a devisee who was not exempt. Before the death of the life tenant, this act of Congress was repealed. The question was whether the repeal of the act relieved the remainderman from any liability for the tax after the death of the life tenant. The act in question provided:

"That such tax or duty shall be due and payable whenever the party on whose distributive share of an estate the tax is charged shall be entitled to the possession or enjoyment thereof."

Construing the act, it was held that no right to tax accrued thereunder until after the death of the life tenant, when the tax should become *payable*, and that the repeal of the act before the death of the life tenant, terminated the right of the Federal government to exact the tax thereafter. Of these two cases, the appellant builds upon the first, and the appellee upon the second. These two cases and the distinction between them illustrate how narrow the controlling question is herein.

Whether the treaty is applicable, therefore, is to be determined by the proper construction of the Iowa statute in force prior to August, 1911. If it be true that, under a fair construction of this statute, a liability for the tax attached as a lien upon the devised estate immediately upon the death of the decedent, then the tax was asserted and, in legal sense, exacted at that time, even though grace of time was allowed until after the death of the life tenant for the actual payment of same. It may well be presumed that the tax *accrues* only when it becomes *pay-*

2. TAXATION:
collateral inheritance tax:
instant or deferred payment.

able, unless, by fair construction of the statute, it affirmatively appears otherwise. This was the presumption followed in *Clapp v. Mason*, supra. But the decisive question, nevertheless, is, When did the liability for the tax *accrue*? and not, When did it become payable? So far as material for our consideration, our present statute was enacted prior to August, 1911, and we turn thereto. The following excerpts will serve as sufficient basis for our discussion:

"Sec. 1481-a. The estates of all deceased persons, * * * which shall pass by will or by the statutes of inheritance of this or any other state or country, or by deed, grant, sale, gift, or transfer made in contemplation of the death of the donor, or made or intended to take effect in possession or enjoyment after the death of the grantor or donor, to any person, or for any use in trust or otherwise, other than to or for the use of persons, or uses exempt by this act shall be subject to a tax * * * Any person beneficially entitled to any property or interest therein because of any such gift, legacy, devise, annuity, transfer or inheritance, and all administrators, executors, referees and trustees, and any such grantee under a conveyance, and any such donee under a gift, and any such legatee, annuitant, devisee, heir or beneficiary, shall be respectively liable for all such taxes to be paid by them respectively. The tax aforesaid shall be for the use of the state, *shall accrue at the death of the decedent owner*, and shall be paid to the treasurer of state within eighteen months thereafter, except when otherwise provided in this act, and shall be and remain a *legal charge against and a lien upon such estate*, and any and all of the property thereof from the death of the decedent owner until paid. Real estate sold under order of court shall be released from the lien imposed by this act and the lien shall attach to the proceeds of such sale, provided that prior to the approval of such sale there shall have

been given by the person making such sale a good and sufficient bond conditioned to secure the payment of all tax secured by the lien so released. This provision shall not be construed to relieve from personal liability any person owing such tax or whose duty it is to collect and pay such tax to the treasurer of state.

"Sec. 1481-a5. Whenever it appears that an estate or any property or interest therein is or may be subject to the tax imposed by this act, the clerk shall issue a commission to the appraisers, who shall fix a time and place for appraisement, except that if the only interest that is subject to such tax is a remainder or deferred interest upon which the tax is not payable until the determination of a prior estate or interest for life or term of years, he shall not issue such commission until the determination of such prior estate, *except at the request of parties in interest who desire to remove the lien thereon.*

"Sec. 1481-a10. When any person, whose estate over and above the amount of his debts, as defined in this act, exceeds the sum of \$1,000, shall bequeath or devise any real property to or for the use of persons exempt from the tax imposed by this act, during life or for a term of years, and the remainder to a collateral heir, said property upon the determination of such estate for life or years, shall be appraised at its then actual market value from which shall be deducted the value of any improvements thereon, or betterments thereto, if any, made by the remainderman during the time of the prior estate, to be ascertained and determined by the appraisers and the tax on the remainder shall be paid by such remainderman as provided in the next succeeding section.

"Sec. 1481-a13. When in case of deferred estates or remainder interests in personal property or in the proceeds of any real estate that may be sold during the time of a life,

term or prior estate, the persons interested who may desire to defer the payment of the tax until the determination of the prior estate, *shall file with the clerk of the proper district court a bond as provided herein in other cases, such bond to be renewed every two years until the tax upon such deferred estate is paid. If at the end of any two-year period the bond is not promptly renewed as herein provided and the tax has not been paid, the bond shall be declared forfeited, and the amount thereof be forthwith collected.* When the estate of a decedent consists in part of real and in part of personal property, and there be an estate for life or for a term of years to one or more persons and a deferred or remainder estate to others, and such deferred or remainder estate is in whole or in part subject to the tax imposed by this act, if the deferred or remainder estates or interests are so disposed that good and sufficient security for the payment of the tax for which such deferred or remainder estates may be liable can be had because of the lien imposed by this act upon the real property of such estate, then payment of the tax upon such deferred or remainder estates may be postponed until the determination of the prior estate without giving bond as herein required to secure payment of such tax, and *the tax shall remain a lien upon such real estate until this tax upon such deferred estate or interest is paid.*

"Sec. 1481-a16. The value of any annuity, deferred estate, or interest, or any estate for life or term of years, subject to the collateral inheritance tax, shall be determined for the purpose of computing said tax by the rule of standards of mortality and of value commonly used in actuaries' combined experience tables as now provided by law. The taxable value of annuities, life or term, deferred or future estates, shall be computed at the rate of four per cent per annum of the appraised value of the property in which such estate or interest exists or is founded. *Whenever it is desired to remove the lien of the collateral inheritance*

tax on remainders, reversions, or deferred estates, parties owning the beneficial interest may pay at any time the said tax on the present worth of such interests determined according to the rules herein fixed."

Construing the foregoing, must it be said that the state asserted a lien for the tax against the estate of the remainderman immediately upon the vesting of such estate and before the enjoyment thereof? Could there be a lien for the tax before a right to the tax had accrued? We direct our attention first to those features of the statute which favor the contention of the appellee. The appraisal provided for, of the estate of the remainderman after the death of the life tenant is based upon its "then market value." Again, an exception is embodied in Section 1481-a, as follows: "Except when otherwise provided in this act." Does this exception negative all the recitals of the sentence in which it is contained, or only the recital immediately preceding it, which provides for time of payment?

Conceding that the appraisal of the estate in remainder, upon its market value as it is after the death of the life tenant, tends to the support of appellee's theory, the fact remains that other provisions of the statute permit an appraisal to be made at any time after the death of the decedent, at the option of the remainderman, whereby the then value of the property may be appraised, and whereby the value of the estate in remainder may be reduced to its present worth; and the present worth of the tax, based upon the expectancy of the life tenant, may be ascertained and paid by the remainderman, and the lien of the tax thereby discharged. These provisions wholly negative the inferences which might otherwise be drawn from the fact of an appraisal after the death of the life tenant, based upon the *then* market value. Taken together, all these provisions lend themselves to the inference that the postponement of payment until the day of enjoyment is a mere grace of time,

which the remainderman may accept or reject at his option. The fact that the acceptance of this grace is attended with the risk of increased valuation does not negative such inference. We deem it clear, also, that the exception contained in Section 1481-a which we have above pointed out refers to the time of payment, and to nothing more. Not only does the statute repeatedly assert a lien, in express terms; it expressly declares, also, the *accrual* of the tax at the death of the decedent.

"The tax aforesaid * * * shall accrue at the death of the decedent owner, * * * and shall be and remain a legal charge against and a lien upon such estate, and any and all of the property thereof from the death of the decedent owner until paid." Section 1481-a, Code Supplement, 1913.

We see no escape from adopting the construction contended for by the appellant. It follows, therefore, that the rights of these appellees were already fixed before the treaty in question went into effect. They took their inheritance and their devise by statutory right. The statutory right thus accorded to them was burdened with a statutory lien for the tax. To that extent, therefore, their right to the inheritance and to the devise was limited. The extent of their burden and of the right of the state to the tax was fixed and vested before the treaty came into effect. The treaty did not purport to be retroactive, but prospective only. It would not, therefore, change the existing rights of the parties, as they were before it went into effect. It follows, therefore, that there was no excess tax collected, and the judgment below must be—*Reversed*.

WEAVER, C. J., PRESTON and SALINGER, JJ., concur.

WILLIAM S. HELLER, Appellee, v. MONTGOMERY COUNTY et al.,
Appellants.

COUNTIES: Acts of Officers—County Attorney Ordering Transcript. A county is liable for the reasonable value of services rendered by a shorthand reporter, at the request of the county attorney and on the order of the court, in preparing a necessary transcript of shorthand notes formerly taken by the reporter as clerk of the grand jury.

Appeal from Montgomery District Court.—O. D. WHEELER,
Judge.

APRIL 6, 1920.

ACTION to recover from defendant county \$280.50, for services rendered defendant in transcribing and extending into typewriting all the testimony of witnesses testifying before the grand jury of said county, whose testimony plaintiff had taken in shorthand, while acting as clerk of the grand jury of said county. No compensation was asked by plaintiff in this action for acting as clerk of the grand jury in taking the shorthand notes, or for transcribing an abstract, or minutes of the evidence used before the grand jury and signed by the witnesses. The compensation asked is for the full transcript of his shorthand notes for use on the trial in court, which was furnished by him at the request of the county attorney, and upon order of the court. He shows the value of his services for making such transcript. There was a trial to a jury. No evidence was introduced on behalf of the defendant, and there is no conflict in the evidence. At the close of plaintiff's evidence, defendant moved for a directed verdict in its favor, which was overruled. Thereupon, plaintiff moved for a directed verdict in his favor, which was sustained. Judgment on the verdict for plaintiff, and the defendants appeal.—*Affirmed.*

Paul W. Richards, for appellants.

T. J. Hysham, for appellee.

PRESTON, J.—Though the defendants other than the county were made defendants, we do not understand that any personal judgment is asked or was rendered against them individually. It appears that plaintiff is a shorthand reporter, and was duly appointed clerk of the grand jury for the February, 1917, term, and acted as such during a part of said term. The evidence taken by the plaintiff before the grand jury in shorthand was only that pertaining to the investigation of the so-called "Villisca ax murders." Several suggestions are made why it was advisable that, under the circumstances, all the evidence in regard to the ax murders should be taken in shorthand and preserved. After the evidence had been so taken in shorthand, the county attorney applied to the court for an order authorizing the making of a transcript of all the evidence. This was after plaintiff had ceased to be the clerk of the grand jury. Pursuant to the application of the county attorney, and on April 5, 1917, the court ordered that all the evidence taken before the grand jury in the investigation of said case be transcribed into typewriting, and certified by the clerk of the grand jury, who took down the testimony in shorthand, and that said translation of said shorthand notes be made at the expense of Montgomery County, together with two copies thereof, same to be kept locked up by the clerk of the court, and only released upon order of the court. The county attorney asked the plaintiff to make the transcript, pursuant to said order. A transcript was made and delivered to the county attorney, turned over to the clerk, and afterwards used in the trial of the case of *State v. Kelley*, who was charged in the indictment with the so-called murders. The defendant objected to the introduction in evidence of the order of court on the ground that the court

had no authority to make such an order, and that the statute fixes the rate of compensation for a transcript, and for the compensation of the clerk of the grand jury. Appellant cites *Hyatt v. Hamilton County*, 121 Iowa 292, and *Mousseau v. City of Sioux City*, 113 Iowa 246, to the point that plaintiff, having accepted the official position of clerk of the grand jury, can make no recovery for his services as such, unless compensation is directed by the statute. In the *Hyatt* case, it was held that an attorney appointed by the court to act for the public in the prosecution of disbarment proceedings is entitled to reasonable compensation, to be paid by the county. It was said that an attorney is, in some sense, an officer of the court, but that he is not a public officer. He could be required, as an officer of the court, to perform the service, but not without compensation, even in the absence of a statute. The statute now provides that, in such cases, no allowance shall be made for attorneys' fees. *Brown v. Warren County*, 156 Iowa 20. In the *Mousseau* case, a recovery was sought by persons who were public officers.

Montgomery County has a population of less than 50,000. Section 5258, Code Supplement, 1913, provides that the clerk of the grand jury shall take and preserve minutes of the proceedings, and of the evidence given before it. Chapter 313 of the Acts of the Thirty-fifth General Assembly (Section 5256, Code Supplement, 1913,) provides that the clerk of the grand jury shall receive compensation at the rate of \$2.00 per day for time actually and necessarily employed in the performance of his duties, and that, in counties having a population of more than 50,000, the court may, if it deems it necessary, appoint as clerk a competent shorthand reporter, and such clerk shall receive such compensation as may be fixed by the court; but, in counties of less than 75,000 inhabitants, such compensation shall not exceed \$4.00 per day. The trouble with appel-

lants' contention is, we think, that plaintiff is not claiming anything for his services as clerk of the grand jury. So far as we know, he has been paid for that, and we assume he has been paid at the rate provided by the statute, to wit, \$2.00 per day. The fact that plaintiff was a shorthand reporter would not prevent his being appointed as clerk of the grand jury for that compensation. This would pay for all his services as clerk of the grand jury, for taking down the shorthand notes, and for making minutes therefrom for the witnesses to sign. His claim in this case is for services rendered thereafter, in making a transcript, and not as clerk of the grand jury. After he had ceased to be the clerk of the grand jury, he was not a public officer. In making the transcript of the shorthand notes, he was not then in the performance of the service of a public officer.

Appellee calls attention to Section 301, Supplemental Supplement to the Code, 1915, which provides for the duties of the county attorney. No cases are cited. Section 308, Supplemental Supplement, provides for the payment by the county of necessary and actual expenses of the county attorney in attending upon his official duties at a place other than his residence. It is doubtless true that the county attorney is not entitled to reimbursement for personal expenses, unless provided by law. 32 Cyc. 701. But the compensation sought to be recovered by plaintiff in this action is not for the personal expenses of the county attorney. It was for the benefit of the state and the county. We think the county attorney has some discretion in incurring costs on the part of the county. In this case, he did not proceed upon his own responsibility, but took the precaution to ask the court to make an order. There can be no question of his good faith. Nor can there be any question that it was necessary, under the circumstances, to have a transcript of this evidence, in order that the county attorney could perform the duties required of him. An un-

usual situation was presented. Neither the county attorney nor the court could arbitrarily or unnecessarily put the county to expense. But we think that, in a proper case, such as this, the county attorney had the authority, had authority under order of the court, to order the transcript of the evidence. Each case must rest upon its own peculiar facts. It is conceded by plaintiff that the extent to which a county attorney can order costs made at the expense of the county, as well as the inherent powers of a court, cannot be clearly defined. It is a matter of state history that the so-called ax murder, wherein eight people were murdered, was one of the greatest crimes in the history of the state. There was no direct evidence of the guilt of any person. Suspicion was directed against different ones. It was necessary that every clue should be run down. It may be that hundreds of witnesses were brought before the grand jury to this end. It was proper and necessary that all the evidence should be preserved, so that some chance evidence might dovetail with other testimony, and thus solve the problem. Doubtless, many witnesses were present, awaiting their turn to be called before the grand jury. For an ordinary clerk of the grand jury to have taken down the testimony in longhand would have resulted in the loss of valuable evidence, and consumed unnecessary time. The transcript was necessary, and could properly be used to refresh the memory of witnesses and counsel, for impeachment purposes, and could be used, possibly, in further investigations. The shorthand notes which had been taken would have been useless, unless transcribed. Unless, under such circumstances, the county attorney has such authority, the interests of the state and the administration of justice would be hampered. We are of opinion that the trial court rightly held that the plaintiff was entitled to recover. The judgment is, therefore,—*Affirmed*.

WEAVER, C. J., EVANS and SALINGER, JJ., concur.

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usual situation was presented. Neither the county attorney nor the court could arbitrarily or unnecessarily put the county to expense. But we think that, in a proper case, such as this, the county attorney had the authority, had authority under order of the court, to order the transcript of the evidence. Each case must rest upon its own peculiar facts. It is conceded by plaintiff that the extent to which a county attorney can order costs made at the expense of the county, as well as the inherent powers of a court, cannot be clearly defined. It is a matter of state history that the so-called ax murder, wherein eight people were murdered, was one of the greatest crimes in the history of the state. There was no direct evidence of the guilt of any person. Suspicion was directed against different ones. It was necessary that every clue should be run down. It may be that hundreds of witnesses were brought before the grand jury to this end. It was proper and necessary that all the evidence should be preserved, so that some chance evidence might dovetail with other testimony, and thus solve the problem. Doubtless, many witnesses were present, awaiting their turn to be called before the grand jury. For an ordinary clerk of the grand jury to have taken down the testimony in longhand would have resulted in the loss of valuable evidence, and consumed unnecessary time. The transcript was necessary, and could properly be used to refresh the memory of witnesses and counsel, for impeachment purposes, and could be used, possibly, in further investigations. The shorthand notes which had been taken would have been useless, unless transcribed. Unless, under such circumstances, the county attorney has such authority, the interests of the state and the administration of justice would be hampered. We are of opinion that the trial court rightly held that the plaintiff was entitled to recover. The judgment is, therefore,—*Affirmed*.

WEAVER, C. J., EVANS and SALINGER, JJ., concur.

MINNIE H. BADER, Appellant, v. ANDREW N. HISCOX, Appellee.

FRAUDS, STATUTE OF: Promise Made on Marriage Consideration.

- 1 An agreement that a property settlement would be made upon a seduced woman if she would dismiss her civil action against the seducer and marry him, and thereby abate criminal proceedings, is not a promise made in consideration of marriage.

FRAUDS, STATUTE OF: Promise on Consideration of Marriage—

- 2 Performance. *Arguendo*, it is conceded that the actual entering into the marriage relation does not constitute performance or part performance of a promise made in consideration of marriage.

FRAUDS, STATUTE OF: Denying Statute to Prevent Fraud. It is

- 3 suggested that he who makes a *promise in consideration of marriage* may not take cover under the statute of frauds, and thereby avoid performance, *when he has inveigled the woman into an actual marriage* on the pretense that the promise would be performed.

FRAUDS, STATUTE OF: Debt or Default of Another. An agree-

- 4 ment with a seduced woman, made by the father of the seducer, that *he* (the father) would make a settlement on the woman if she would dismiss civil and criminal proceedings against the son, is not a promise to answer for the debt or default of *another*.

Appeal from Cherokee District Court.—C. C. BRADLEY,
Judge.

NOVEMBER 11, 1919.

REHEARING DENIED APRIL 13, 1920.

Action at law, to recover damages for an alleged violation of contract. There was a directed verdict and judgment for defendant, and the plaintiff appeals.—*Reversed*.

Cloud M. Smith, for appellant.

Molyneux & Maher, for appellee.

WEAVER, J.—This action was begun on September 13, 1918. The petition alleges that, in the year 1891, when plaintiff was about 17 years of age, she was seduced by one Eugene Hiscox, son of the defendant herein, and, as a result of her association with the said Eugene, she became pregnant, and gave birth to a daughter in September, 1892; that, shortly before the birth of the child, plaintiff brought action against the said Eugene Hiscox in the district court of Cherokee County, to recover damages for her seduction and for breach of promise of marriage, and also instituted criminal proceedings against him in the courts of that county, to punish him for said offense.

1. FRAUDS, STAT-
UTE OF: prom-
ise made on
marriage con-
sideration.

Plaintiff further alleges that, soon after the institution of said proceedings, civil and criminal, the defendant, father of Eugene Hiscox, came to her and offered that, if she would marry Eugene, and dismiss the proceedings against him, civil and criminal, he, defendant, would convey to the plaintiff a certain designated 40 acres of land in Cherokee County; that plaintiff accepted said offer, and did then and there dismiss her action for damages, and, by marrying the accused, caused the criminal proceedings against him to be abated; but the defendant neglected and refused, and still neglects and refuses, to perform his agreement to convey to her the land.

Plaintiff further alleges that the contract pleaded by her was made in Cherokee County, Iowa, where all the parties then resided; but that, after the performance of said agreement on her part, and within less than five years thereafter, the defendant removed from this state to the state of Mississippi, where he has since continuously resided; that, at the date of said agreement and its perform-

ance on her part, the land was reasonably worth about \$1,400, for which sum, with interest thereon, and for rents and profits of the land, she asks a recovery of \$5,084. By an amendment to her petition, plaintiff increases her claim for damages to \$8,000.

The defendant answers the petition, denying its allegations, pleading the statute of limitations, and alleging that the contract pleaded by plaintiff is "immoral, void, and in contravention of the statute of frauds."

The testimony offered tends fairly to sustain the allegations of the petition that, when the said Eugene Hiscox had been made defendant in both civil and criminal proceedings, charged with plaintiff's seduction, appellee visited plaintiff, and proposed that she dismiss her suit for damages, and, by marrying his said son, put an end to the criminal prosecution against him; and that, if she would do so, he, defendant, would convey to her by deed a certain 40 acres of land then owned by him. He further explained to plaintiff that, unless she married Eugene, the young man was liable to be sent to prison, and agreed that, if she would accept his offer, and release his said son from both civil and criminal liability, he would execute the deed of the land to her, as proposed, and send it to her with the marriage license. It is alleged that plaintiff finally accepted the proposition; the marriage was solemnized, the civil suit dismissed; and the criminal proceeding abated, but that defendant did not send the deed, as promised; that, shortly after the marriage, defendant again visited plaintiff at her home, and asked her to go out to the farm and live with Eugene, saying that he would make the deed and send it by Eugene when he (Eugene) came for her, and would put buildings on the 40, so that she and her husband could move upon it in the spring; that, without performing his promise in any respect, defendant left the state, since which time he has been and remained a nonresident of Iowa; that.

on two or more occasions since that time, when temporarily visiting Iowa, defendant talked with plaintiff on the subject, admitting his promise, and expressed his purpose to convey the land to her, for the benefit of herself and of the child, but always postponed the making of the deed, on some excuse or pretext. Plaintiff's testimony is corroborated in most respects by several witnesses. The land in question is shown to have been worth from \$32 to \$35 per acre in 1892, but has since advanced in value to about \$250 per acre. It appears, also, that defendant sold and conveyed the land to a third person, in the year 1896, but this was not known to the plaintiff until several years thereafter.

When plaintiff had rested her case in chief, the defendant moved the court to strike all the testimony offered in support of her claim, and to direct a verdict in defendant's favor, on the grounds:

1. That the contract alleged and sought to be proved is within the statute of frauds, and, not being in writing, no proof thereof is admissible.

2. That the alleged cause of action is barred by the statute of limitations.

3. That proof of the value of the land does not afford the correct measure of plaintiff's damage, if any, and that there has been unreasonable delay in bringing her action.

The motion was sustained by the court, a directed verdict for defendant was returned, and judgment entered thereon.

- I. The record does not clearly indicate whether the trial court sustained the motion to strike, and for a directed verdict generally, upon all the grounds assigned therefor, but we infer from the abstract that the order was based on the objection that the contract pleaded by the plaintiff is within the statute of frauds. It is quite evident, we think, that there is no merit in the objection that plaintiff did not sufficiently avoid the plea of the statute of limitations, or in

the further objection that there is no sufficient proof of damages resulting to the plaintiff from the alleged violation of contract. We shall, therefore, confine our discussion to the question whether proof of the alleged contract is so affected by the statute of frauds as to preclude plaintiff's right to a recovery.

The provision of the statute referred to is that:

"Except when otherwise specially provided, no evidence * * * is competent, unless it be in writing and signed by the party to be charged," of certain specified contracts, among which are: "(2) Those made in consideration of marriage; (3) those wherein one person promises to answer for the debt, default or miscarriage of another * * *; (4) those for the creation or transfer of any interest in lands, except leases for a term not exceeding one year." Code Section 4625.

By the next section, Code Section 4626, it is provided that the provisions of the fourth subdivision of Section 4625, above quoted, relating to lands, shall not apply when any part of the purchase price has been paid, "or when there is any other circumstance which, by the law heretofore in force, would have taken the case out of the statute of frauds."

It may be conceded, for the purposes of this case, that, if the promise upon which plaintiff relies, and for breach of which she asks damages, is within the statute of frauds,

as being a promise in consideration of marriage, then the fact that she did enter into the marriage is not performance or part performance, bringing it within the exception provided for in Code Section 4626,—though

there is very respectable authority to the contrary: *English v. Richards Co.*, 109 Ga. 635; *Browne on Statute of Frauds*, Section 459; *Nowack v. Berger*, 133 Mo. 24; *Larsen v. Johnson*, 78 Wis. 300.

2. FRAUDS, STATUTE OF: promise on consideration of marriage: performance.

We have, then, to inquire whether the alleged promise in this case was within the statute, as having been made in consideration of marriage. In our judgment, this question must be answered in the negative. In the first place, let us recall that our statute of frauds does not make a contract which is within its terms either unlawful or void, and in this respect it differs from the statute of frauds in some other jurisdictions. The sole effect of the statute as we have it is to deny to the promisee the right to establish such contract or promise by parol proof. It follows, we think, that, if a promise be made upon a lawful and sufficient consideration, which is not within the statute, and may be established by parol testimony, the promisor cannot evade liability thereon because there was another or additional consideration, proof of which is excluded by the statute. But we think it clear that the promise in this case was not made in consideration of marriage. The thing for which the defendant was bargaining was not the marriage of his son, but the release of his son from liability to a judgment for damages in the plaintiff's civil suit, and to obtain a dismissal of the criminal prosecution against him. The marriage was a mere incident, and not the end to be attained or purpose to be accomplished, and to that end, defendant was willing to make a marriage settlement upon the plaintiff, for the protection of herself and of the child born, or to be born, of her relations with the accused.

Quite applicable in principle, though diverse in its facts, is the precedent found in *Larsen v. Johnson*, 78 Wis. 300. In that case, Susan Larsen, a widow, having a small amount of property, entered into an oral contract with Andrew Johnson, by which the latter undertook to provide for her support, pay her debts, and take care of, manage, and improve her land, so as to make it productive for such purpose; and to that end it was agreed that they should

become husband and wife, and live together on the land, and, in consideration of the foregoing agreement, the said Susan would convey the land to her husband in fee simple. The parties were married, and the husband performed the obligations of his said agreement. After the death of Susan, litigation with her heirs ensued, involving the question of the validity of the agreement between Johnson and his wife, and the statute of frauds was invoked by the parties claiming adversely to the husband. The court overruled the objection, saying:

"The marriage of the parties was not the consideration of the contract to convey the land or any part of it. It was only incidental, as the condition or relation in which the respondent should render to the said Susan Larsen, and she receive, her support and comfort, as the consideration of the conveyance. The agreement to marry may have been made at the same time, but not as any part of the consideration for the conveyance. It was for the benefit of the respondent, as much as, if not more than, it was for her benefit. *There was sufficient lawful and valuable consideration to support the contract, aside from any supposable consideration of marriage.*"

Now, plaintiff had the right to settle or dismiss her suit for damages, and to consent to the dismissal of the criminal prosecution. The defendant had the right to purchase immunity for his son, in the civil case, on the best terms he could obtain, and he could lawfully bind himself to make provision for the support of plaintiff or her child, in consideration of the release by her of his son from criminal liability for her seduction. *Armstrong v. Lester*, 43 Iowa 159; *Wright v. Wright*, 114 Iowa 748. To be sure, the only way plaintiff could effectually dismiss the criminal proceeding was by marriage with her alleged seducer; but here again is demonstrated the fact that the marriage was only an incident to the thing contracted for, the release of the

accused from further liability, civil and criminal, for the wrong with which he was charged. Plaintiff has performed her part of the agreement; she has dismissed her action for damages, and by her act has secured the discharge of the defendant's son from criminal liability; and there is no apparent reason why defendant should not be held to performance on his part.

There is another aspect of the question we have discussed which, though possibly not quite pertinent to the case as made by the plea, is not without bearing upon the principles we affirm in this decision. The purpose and intent of the statute of frauds is to prevent fraud, and the courts will, so far as possible, refuse to permit it to be made the shield for fraud. Discussing the subject, the Massachusetts court says of precedents applying to this rule:

3. FRAUDS, STATUTE OF: denying statute to prevent fraud.

"The cases most frequently referred to are those arising out of agreements for marriage settlements. In such cases, the marriage, although not regarded as a part performance of the agreement for a marriage settlement, is such an irretrievable change of situation that, if procured by artifice, upon the faith that the settlement had been, or the assurance that it would be, executed, the other party is held to make good the agreement, and not permitted to defeat it by pleading the statute." *Glass v. Hulbert*, 102 Mass. 24, 39.

See, also, *Peek v. Peek*, 77 Cal. 106; *Green v. Green*, 34 Kan. 740; 4 Pomeroy's Eq. (3d Ed.), Section 1409.

The further suggestion by appellee, that the alleged promise of the defendant is within the statute of frauds, as being an engagement or promise to answer for the debt, default, or miscarriage of another, is not sound. The defendant did not undertake to answer for the debt or default of his son. The promise, if made at all, was his own individual undertaking, and this is none the less true

4. FRAUDS, STATUTE OF: debt or default of another.

because his son enjoyed the benefit, in whole or in part, of the performance of the agreement on part of the plaintiff. The obligation assumed by him was primary, and upon his own credit. Nor can the promise be avoided on the theory that it was the transfer of title or interest in real estate, for plaintiff's evidence sufficiently shows full performance on her part.

It follows that the trial court erred in striking the evidence and directing a verdict for the defendant. A new trial is, therefore, awarded.

The judgment below is—*Reversed*.

LADD, C. J., GAYNOR and STEVENS, JJ., concur.

LOIS W. BLOOMQUIST, Appellee, v. BOARD OF SUPERVISORS,
HARDIN COUNTY, Appellant.

FANNIE W. EMENY, Appellee, v. BOARD OF SUPERVISORS,
HARDIN COUNTY, Appellant.

DRAINS: Nonallowable Amendment on Appeal. Objections before

- 1 the board of supervisors that an assessment is illegal and inequitable, because of (1) nonbenefits, (2) nonproportional benefits, and (3) inability to tile into the drain, may not be enlarged on appeal by a so-called amendment asserting that the commissioners to assess benefits wholly failed to qualify or act as such commissioners.

DRAINS: Waiver by Landowner of Illegal Procedure by the Board.

- 2 Irregularity and illegality of procedure by the board in exercising its conceded jurisdiction over a drainage proceeding may be waived by an objecting landowner. So held where it was assumed that the board had resolved that an assessment for improving an existing ditch should be made in the proportions adopted for the original construction, and thereafter appointed the commissioners of benefits, who computed the assessment in accordance with the resolution, and returned it to the board, and the landowner did not object thereto, except on appeal from the action of the board in confirming the assessment.

DRAINS: Theory of Hearing before Board Followed on Appeal.

3 The theory of a hearing before the board, that the amounts of assessments were subject to change on meritorious showing, will be followed on appeal, even though the board, in view of its former action, might have taken the position that such assessments were a mere matter of mathematical computation, and subject to no change except for error in so computing.

DRAINS: New Improvement (?) or Repair (?) The fact that the

4 cost of an improvement on an existing drain is almost double the cost of the original construction is very persuasive that such improvement should not be classed as a *repair*.

DRAINS: Implied Annulment of Proceeding. A resolution by the

5 board, ordering an assessment for improving an existing drain to be computed in the proportions which governed in the original construction, is impliedly annulled by the action of the board in treating the assessment, on objection by a landowner, as subject to change on a showing of inequity.

DRAINS: Inequitable Assessments Between Upper and Lower Own-

6 ers. Record held to demonstrate that the assessment of lands near the outlet of a drain, where but little of the cost accrued, was inequitable, when compared with assessments of lands at the far-removed source of the drain, where a very large proportion of the cost did accrue.

Appeal from Hardin District Court.—G. D. THOMPSON,
Judge.

APRIL 13, 1920.

IN the district court, this was an appeal from an assessment of benefits. Two appeals were consolidated, and tried as one. On trial in the district court, a reduction was allowed to the plaintiffs to the extent of $33\frac{1}{3}$ per cent. Both parties appealed. The defendant board of supervisors, having first perfected its appeal, appears in this record as appellant.—*Affirmed*.

Peisen & Soper, H. L. Adams, and George E. Hise, for appellants.

C. G. Lee, C. W. Garfield, and T. G. Garfield, for appellees.

EVANS, J.—The drainage improvement under consideration was made to and upon a former drainage improvement, and consisted of cleaning, deepening, and widening an open ditch, formerly constructed, and of converting a substantial portion of the same into a covered tile drain. It involved no change of the boundaries of the former district or of the line of location of the former drain. It did, however, appropriate more land for the widened ditch and the increased berms. The former district was known as No. 3, of Hardin County; and known also in the record as the Dougan district. It was originally established in 1909. The drain consisted of an open ditch, 9 miles long. The original improvement proved inadequate in depth, in many places, to afford adequate outlet for its watershed. Upon presentation of a petition by one of the property owners whose land was situated near the upper end of the drain, the present improvement was inaugurated. Appropriate resolution of necessity and notice and hearing were had, and the improvement ordered, and contract let. The improvements were completed in 1916. The original drain was 48,500 feet in length, divided into 485 stations, of 100 feet each. These stations were numbered from the outlet up. For the first 80 stations, no new work was required. From Station 80 to Station 351, the ditch was deepened, on an average, between 3 and 4 feet. From Station 351 to Station 485, there was a similar average of deepening. This latter section also was converted into a covered tile drain. The size of the largest tile was 28 inches, which was gradually reduced to 20 inches at the upper end. The cost of the improvement was nearly double the cost of the original improvement, and amounted to over \$30,000. Three fourths of the cost was incurred in the upper section, where the tile was laid. This section was two and one-half miles in length, extending from Station 351 to 485. The plaintiffs'

lands are not contiguous to this section of the drain, but are located near the lower end.

The opening argument before us is made by the plaintiffs, and their appeal is presented therein.

I. On December 28, 1916, a hearing was had in the matter of the assessments of benefits, pursuant to notice by the board. At such hearing, the plaintiffs appeared, and presented objections to be hereinafter set out. In response to such objections, a few minor changes were ordered by the board. In other respects, the objections were overruled, and the proposed assessments were confirmed.

While the appeal of plaintiffs was pending in the district court, the plaintiffs filed an amendment to their petition, which was in the nature of additional objections.

This amendment alleged certain illegalities in the proceedings of the board, in that the commissioners appointed by the board never, in fact, qualified or acted as such, and that they did not, in fact, inspect the lands nor classify the same, nor did they make the purported report which was acted upon at the hearing of December 28th; that the board adopted a resolution on September 1, 1916, whereby it was ordered that the assessment of benefits for the new improvement should be in the same proportion as that adopted in the construction of the original improvement; that, in obedience to this resolution, the plat of the proposed assessments was prepared by mere computation by one of the commissioners, and was presented as the report of the commissioners; that the board, therefore, had no power or jurisdiction to act upon such report or to confirm such proposed assessments; and that the action of the board was null and void. The prayer is that the assessments against plaintiffs be canceled *in toto*, as a nullity.

To grant the prayer of this amendment to petition would necessarily result in a remand of the case to the

1. DRAINS: non-allowable amendment on appeal.

board of supervisors for further proceedings. The first question confronting plaintiffs is whether the objections thus raised by this amendment are available to them, or whether they waived such objections by failing to make them at the hearing before the board. The objections actually presented to the board and by it considered were as follows:

"As grounds for their objections, they state that the assessment is illegal, inequitable, and unjust, for the reason that the land attempted to be assessed for the purpose of the alleged improvement is not, in fact, benefited.

"Second. That the assessment attempted to be levied against the parcels of land belonging to these objectors is unjust and inequitable, because it is a larger assessment, in proportion to the benefit received, than other lands similarly located.

"Third. The assessment is inequitable, illegal, and unjust, for the reason that the land sought to be assessed is not, as a matter of fact, benefited by the proposed improvement, and the proposed improvement does not afford the land of these objectors an adequate outlet.

"Fourth. That the assessment is inequitable, illegal, and unjust, for the reason that a large portion of the land belonging to these objectors cannot be tiled into the open ditch constructed across their land, for the reason that the said open ditch is not of sufficient depth to afford the land an adequate outlet for tile."

The original petition filed in the district court by the plaintiffs on their appeal was predicated wholly upon the foregoing objections, presented to the board. We think it clear that such objections do not afford a basis for the amendment to the petition. The case illustrates the substantial importance of the statutory requirement that objections to be relied upon shall be made, in the first instance, before the board itself. If this had been done with the directness of specification which appears in the amendment

to the petition, it is to be presumed that the board would have taken appropriate action thereon. The opportunity for such action should have been presented to it. To reserve objections so vital, and to present them for the first time on appeal, is the very practice which the statute aims to prevent. To permit it, could only result in a disastrous circumlocution of appellate procedure. It must be held, therefore, that the objections made in plaintiffs' amendment were waived by the failure to incorporate the same in the objections before the board, unless the jurisdictional character of the alleged illegalities be such that they could not be waived, or could not be cured by waiver.

Assuming, for the moment, that the action of the board, thus set forth, was irregular and illegal, could the illegality be cured by the party adversely interested? The

2. **DRAINS:**
waiver by land-
owner of illegal
procedure by
the board.

board had complete jurisdiction of the subject-matter: that is, of the drainage proceeding. The illegality complained of was one which the board itself could have readily cured by correcting its procedure. The power of the plaintiffs to *wave* correct procedure was quite co-extensive with the power of the board to *correct* its procedure. If the illegality defeated the jurisdiction of the board in any sense, it was a jurisdiction of the *res*, and not of the subject-matter. It was, therefore, subject to waiver by the party adversely affected, and his consent to jurisdiction was thereby implied. *In re Appeal of McLain*, 189 Iowa—.

We hold, therefore, that the objection to jurisdiction thus raised by plaintiffs was waived before the board, and that the plaintiffs can be heard on appeal only on the objections presented to the board.

II. Does it follow, from our holding in the preceding division, that the plaintiffs are foreclosed from contesting the assessments at all? If the resolution of September 1st

3. DRAINS:
theory of hear-
ing before
board followed
on appeal.

was valid and effective, it would seem to follow, of logical necessity, that it left nothing to appeal from, except, possibly, the order itself. The classification having been fully determined in the establishment of the original improvement, it would leave nothing to be done but computation, in order to determine the present additional assessments. The parties, however, did not proceed upon this theory in the proceedings before the board. The board gave notice of the hearing upon the proposed assessments. In such notice, it described the proposed assessments as a report of the commissioners. At the hearing, it sustained some of the objections on their merits, and modified some of the assessments responsive thereto. Subject to such changes, its final order of confirmation was as follows:

"Therefore, be it resolved that the assessment as returned by the commissioners as above modified and changed be and the same is hereby established as and for the assessment for said drainage district."

The proposed assessment upon which the hearing was had, purported to be a report of the commissioners, and was regular upon its face as such. Clearly, the mutual theory

4. DRAINS: new
improvement (?)
or repair (?)

of the case in the hearing before the board, adopted by both parties, was that the proposed assessments were subject to review by the board, upon a proper showing of merit.

This would be quite a sufficient reason why we should hold the parties to a trial on appeal upon the same theory and upon the same issues as were considered before the board. Other features of the record lead us in the same direction. The parties disagree as to whether the proceeding pertaining to the improvement is controlled by Section 1989-a21 or by 1989-a25, Code Supplement, 1913. The former relates to *repairs*, and the latter to *new improvement*. The board

followed the procedure provided for a new improvement. It adopted a name for the improvement as such. Its only departure from the regular procedure for a new improvement was its resolution of September 1st and the resulting influence of such resolution upon the action of the commissioners. The distinction between a new improvement and the mere repair of an old one is not always readily drawn. In doubtful cases, the comparative cost of the additional improvement, as compared to the cost of the original improvement, is an important circumstance in the solution of doubt. Ordinarily, repairs are supposed to cost only a part, and usually a small part, of the cost of the original improvement. The cost of the improvement in this case was 190 per cent of the cost of the original improvement. Manifestly, the circumstance of comparative cost, therefore, is one of great magnitude, and tends strongly to support the contention that the procedure should be controlled by Section 1989-a25. Such is our conclusion.

Indeed, we should be reluctant to hold, in any case, that an expenditure of 190 per cent of the cost of an original improvement should be deemed a mere repair thereof. It necessarily follows that the plaintiffs have a right to be heard on the merits of their objections presented to the board. Their right of hearing on appeal to the district court was co-extensive with their right of hearing before the board. If they had a right to a hearing before the board, it was not foreclosed by the ex-parte resolutions of September 1st. If the plaintiffs were entitled to notice of final hearing, the resolution itself was premature and ineffective for want of such notice.

Though the resolution purported to adopt the original apportionment for the new assessment, as provided in Sections 1989-a12 and 1989-a21, yet we have held that such pro-

5. DRAINS: implied annulment of proceeding. vision is not mandatory, except in the absence of good cause for a different apportionment. *Christenson v. Board of Supervisors*, 179 Iowa 745; *Loomis v. Board of Supervisors*, 186 Iowa 721; *Board of Supervisors v. McDonald*, 188 Iowa 6.

That a good cause existed in this case for a different apportionment of benefits, by reason of the construction of expensive tile drains over the upper section of the course, appears quite conclusively, under the evidence.

If the plaintiffs had had no right to a hearing or to a notice, a somewhat different question would be presented as to the effectiveness of the resolution of September 1st. Even then, if the board had a right to adopt an ex-parte resolution without notice, it had the same right, likewise, to annul it. The board, having given notice of a final hearing, and having held the same, and having acted thereon, should not be heard thereafter to say that the plaintiffs were not entitled to a hearing at all, because of its previous resolution. Its subsequent procedure was a virtual annulment of the resolution. It would be idle to grant a hearing to the landowners, if a hearing were already foreclosed by the previous resolution.

Inasmuch as we hold the case to be controlled by the sections pertaining to new improvement, rather than by Section 1989-a21, as pertaining to mere repair, we have no occasion to decide whether, under the latter section, the plaintiffs would have been entitled, as a matter of right, to a notice of final hearing thereunder. For the time being, we are not wholly agreed upon that particular question.

III. A reading of the record satisfies us, also, that the trial court properly held that the plaintiffs were entitled to some modification of the assessments against them. It

will not be practicable for us to go into the details of the evidence. As between the district area contiguous to the new tile drain, and the district area far removed therefrom down the course, there is little room for doubt, under the evidence, that the proportionate benefit from the new improvement accruing to the upper area was substantially greater than such benefit accruing from the original improvement could have been, and that the proportionate benefit to the lower area was accordingly less. The trial court reduced the assessments of the plaintiffs $33\frac{1}{3}$ per cent. As we have often said, approximation is the best that we can do in this class of cases.

By consent of the parties, the trial judge and opposing counsel went upon the ground, and viewed the improvement and its watershed. The advantage of such a course, as an aid to careful judgment, is self-evident. The conclusion reached by the trial court has substantial support in the printed evidence. Both parties appealed from its finding, the plaintiffs contending for a reduction of not less than 60 per cent, and the defendants resisting any reduction at all. We think that the order made by the trial court presents as near an approximation as we can make, under the record before us.

In the consideration of the record in this class of cases, the first presumption obtains in favor of the finding of the board. It is presumed that it has acted with the aid of the commissioners, including their engineer, and that these commissioners have made a careful inspection of the improvements and the land affected by them. The fact that such procedure was not followed in this case of itself tends to negative the presumption which would otherwise obtain.

The record before us contains the evidence of the en-

gineers, who have made careful inspection, and taken the elevations with appropriate instruments. The trial judge had the advantage of weighing this evidence in the light of his own personal inspection of the grounds. We think the result reached is approximate equity. The order of the district court will be affirmed on both appeals.—*Affirmed*.

PRESTON, SALINGER, and STEVENS, JJ., concur.

WEAVER, C. J., concurs in result.

W. E. CHESLEY, Administrator, Appellant, v. WATERLOO, CEDAR FALLS & NORTHERN RAILROAD COMPANY, Appellee.

NEGLIGENCE: Street Car Passenger Alighting at Unusual Place.

- 1 Negligence *per se* may not be predicated on the act of a street railway company in permitting a mature passenger, in full possession of his faculties, voluntarily to alight at a reasonably safe point other than at street intersections—the usual stopping point.

CARRIERS: Termination of Relation of Carrier and Passenger.

- 2 The relationship of passenger and carrier ceases instantly when a street car passenger, mature and in full possession of his faculties, voluntarily alights from the car at a point in the street other than the usual stopping place.

Appeal from Black Hawk District Court.—H. B. BOIES, Judge.

APRIL 13, 1920.

PLAINTIFF'S intestate, after alighting from a car, was struck by a passing automobile, and received injuries from which he died. This action is to recover for such injuries. The district court sustained a motion for a directed verdict. Plaintiff appeals.—*Affirmed*.

Williams & Clark, for appellant.

Pickett, Swisher & Farwell, for appellee.

GAYNOR, J.—The facts on which the liability of the defendant company is predicated are these: Plaintiff's intestate was a passenger on one of the defendant's cars on East Fourth street. The point to which he de-

1. **NEGLIGENCE:** street car passenger alighting at unusual place. desired to be carried is not shown. The car in which he was riding stopped at a point about midway between Sycamore and Lafayette Streets. The further passage of the car was interrupted by another car, standing on the same track ahead of it. This was not the place designated by the company for taking on or letting off passengers. However, passengers were frequently received and discharged at this point. It was the rule and custom of the company to stop at the near crossing, for the purpose of receiving and discharging passengers, but passengers desiring to enter at this point were frequently received, and passengers were frequently permitted to alight at this point, when they signaled a desire to do so. At this particular time, the car on which deceased was riding stopped, a few seconds, at this point, for the reason aforesaid. The deceased arose from his seat and proceeded to the exit, the door was thrown open, and he alighted upon the street. After he had reached the street, and was in the act of crossing to the curbing, and after he had made a step or two in that direction (the exact number is in dispute), he was struck by an automobile, passing along the street, and was injured, and from these injuries he died. His administrator bases his right to recover on these facts. His claim is that the defendant company was negligent in permitting the deceased to alight at this point. This claim is based upon the fact that this was a very congested part of the city, and auto cars frequently passed this

point, thereby imperiling the safety of persons attempting to pass from the car to the curbing. There are two tracks on this line. Lafayette Street crosses East Fourth Street. There are tracks on Lafayette Street, but these do not cross Fourth Street. When they reach East Fourth Street, they circle onto Fourth Street, and thereafter proceed upon Fourth. The switches that carry the cars from Lafayette Street onto Fourth Street extend, and reach the car tracks on Fourth Street, a considerable distance from Lafayette Street on Fourth, and cars passing on Fourth Street are required to stop, necessarily, in order to allow these Lafayette cars to pass onto the Fourth Street tracks.

All negligence is bottomed on the idea of a duty neglected, and it becomes important to ascertain the exact relationship existing between the deceased and the street car company, at the time the injury occurred, in order to say, in a legal way, what duty the defendant company owed the deceased, at and immediately prior to his injury.

There is nothing in this record to show deceased's objective point, or what he intended as his destination. He did not communicate this to the one in charge of the car.

When the car reached this point, he voluntarily arose, indicated a desire to leave the car, and was permitted to do so. The door was opened, and he alighted. It is not claimed that there was anything defective in the car, and the evidence does not show any defect in the car that in any way contributed to his injury. The place at which he alighted was not, in and of itself, dangerous or unsafe. It was a place open for public travel, and, in the absence of any showing, we must suppose it was in a reasonably safe condition for the public's use. While the defendant was on the car, while he was a passenger, the company owed him the high duty which the law imposes upon common carriers. When that relationship ceased, this

2. **CARRIERS: termination of relation of carrier and passenger.**

high duty ended. When he passed from the car onto the street, his relationship with the company ended, and he became as any other traveler upon the public highway, subject to the perils of such travel. What legal duty, then, did the company violate or neglect that contributed to or caused the injury that resulted in his death? It received him as a passenger, and carried him in safety to a point where he signified a desire to sever his connection with the company as a passenger. The door was opened, and he was permitted to do so. He passed from the car in perfect safety, to the public streets. Upon the public streets, he received the injury which caused his death. It is thought that the peril was greater at this point, because of the fact that those using the streets for traffic or travel were not charged with notice that passengers were being discharged at that point, and would not be as careful in their driving and in the management of their vehicles as they would be at a point where it was customary for passengers to alight from a car; that those using the street for traffic or travel, not having any warning that passengers were about to alight from a car at a point not customarily used by the company for discharging passengers, would not be so vigilant. There is no doubt that the peril was greater, but was it a peril against which the company owed a duty to afford the deceased protection? Deceased had a right to sever his connection with the company as a passenger at any time. The company had not agreed to carry him to any particular point, nor had it assumed any contractual duty to discharge him at any particular point, nor had he advised the company at what point he desired to be released from the car and to sever his connection with the company as a passenger, except as indicated by his act in leaving at this point. He chose his time and place, and he was within his right in doing this. All passengers are discharged upon the public streets, even when discharged at the near crossing. The

right of the passenger to sever his connection at any point is a legal right of which he may avail himself—a right which the company cannot deny him; at least, it owes no duty to forcibly detain him, after he has expressed his desire to sever his connection, and leave the car. There is nothing in this record to show that the peril was greater at the point where he did alight than it would have been at the near intersection, except as that peril may be found in the suppositional fact that those using the street for traffic would be less on their guard, less watchful and careful, in the middle of the block than they would be at the near intersection.

There is no negligence predicated on the failure to warn him of the danger when he was about to alight. The record shows that the defendant was mature, in full possession of all his faculties; that he voluntarily chose to leave the car at this point. It does not appear that there was anything to obscure his view of the street towards which he was about to proceed, or that he did not have knowledge of the congested nature of the street and the frequency with which automobiles were passing and repassing. He signified his purpose to leave the car, and, in obedience to this, the door was opened, and he was permitted to alight. He alighted in safety. He reached the street in safety. He had taken a few steps upon the street (the number is in dispute), when he was struck. The evidence shows that he neither looked to the right nor to the left as he stepped from the car, nor as he proceeded out upon the street. The automobile was but a short distance away from him at the time. The slightest care on his part would have discovered the approaching automobile. The party in charge of the car was in no better position to know the peril that attended his exit than was the deceased. No duty rested on the street car company to escort him from its car to a place of safety upon the street. When he severed his con-

nection and passed onto the street, he was free to move in any direction that his fancy suggested. The company then had no power over his motions.

Courts have differentiated between the duties of a street car company to its passengers and a commercial railway, in so far as a duty rests upon either to furnish safe passage to and from a car. From the very nature of things, a street car company cannot discharge those duties with respect to passengers. It has no control over the streets or traffic upon the streets. It has no stations or platforms, and can erect none upon the street. From the curbing to the car is a public place, open to travel by all, and over it the company has no jurisdiction or control. It owes, therefore, no duty to protect the passenger after he has passed from the car onto the street. If it owes no affirmative duty, no liability can be predicated upon its failure to act affirmatively. If it owes neither contractual nor legal duty to the passenger, after he leaves the car, to protect him against injury, then a failure to afford him protection does not involve the company in negligence, or lay the basis for liability. This question has been before the courts many times, though never in this form before our own court.

In *Scanlon v. Philadelphia Rapid Transit Co.*, 208 Pa. 195 (57 Atl. 521), a case in which plaintiff was riding upon a street railway, and suffered injury by reason of defects in the street, the Supreme Court of Pennsylvania said:

"The car was running upon the public highway, over which, it must be remembered, the defendant company has no control. In laying its tracks, it must conform to the established grade. It can neither construct nor alter any of the places at which passengers are to step on or off its cars. It is obliged to place its tracks and run its cars where the public authorities direct. The contour of the surface of the street and the sides and gutters are all fixed by the municipal authorities. Passengers leaving the cars must step

upon the surface of the street in the condition in which it is placed by the city, which fixes and maintains the grades. Obviously, the rules which might well and reasonably apply to steam railroads, owning their own right of way and having complete control of the approaches thereto, cannot reasonably be applied to street railways, which have not the right of eminent domain, and are only allowed the use of the public highways in common with other vehicles. It may be that, in this case, the conductor misunderstood the signal of the plaintiff, and stopped the car sooner than she wished; but, if so, she had only to signify that fact, and retain her seat, and be carried to the desired spot. She was under no compulsion, nor did she receive even a suggestion from the conductor as to where she should get off. That was a matter solely for herself. But the stopping of the car had nothing whatever to do with the cause of the accident; that resulted entirely from the manner in which she left the car. The fact that the street sloped off at the side upon a descending grade to the gutter, necessitated a very long step for any passenger attempting to get off in that vicinity. But this fact was perfectly obvious to the plaintiff, if she used her eyes, which she was certainly bound to do. She was leaving the car in broad daylight, and she was apparently able-bodied, and in the full possession of her faculties; and there was no reason for the conductor to interfere with her desire to leave the car at that particular time and place. * * * The car was standing perfectly still, and so remained until after she left it. It is true that the highest courtesy upon the part of the conductor would have impelled him to step off the car and assist a lady to alight, who desired to leave the car at a point which involved the taking of an unusually long step; but we cannot say that he was under any legal obligation to do so. We know of no rule which requires the conductor of a street car to supervise every motion of a passenger stepping from

a stationary car to the ground. We think he may assume that, under such circumstances, in broad daylight, with everything open to view, the passenger, even though a woman, may be allowed to judge for herself the distance she can safely step."

Oddy v. West End Street R. Co., 178 Mass. 341 (59 N. E. 1026), was an action to recover damages for injuries received by a passenger in the act of leaving a car of a street railway company and coming in contact with a horse cart, rapidly moving on the street. The court said:

"Street-car companies, carrying passengers in ordinary public streets or highways, are not negligent in not providing means for warning passengers about to leave a car of the danger of colliding with or being run over by other vehicles in the street. The risk of being hurt by such vehicles is the risk of the passenger, and not that of the carrier. It is not a danger against which the carrier is bound to protect the passenger or to give him warning."

In *Powers v. Connecticut Co.*, 82 Conn. 665 (74 Atl. 931), the Supreme Court of Connecticut said, after stating the fact that she was injured after she alighted from the car:

"A passenger on a street car ceases to be such when, at the end of his trip, he steps from the car upon the street. He then becomes a traveler upon the highway, and those responsible as common carriers for the due operation of the railway are not responsible, as such, for his safe passage across the road."

As bearing upon the same question, see *Creamer v. West End Street R. Co.*, 156 Mass. 320 (31 N. E. 391); *Farrington v. Boston Elev. R. Co.*, 202 Mass. 315 (88 N. E. 578); *Conway v. Lewiston & A. H. R. Co.*, 87 Me. 283 (32 Atl. 901); *Smith v. City & Suburban R. Co.*, 29 Ore. 539 (46 Pac. 136); *Indianapolis St. R. Co. v. Tenner*, 32 Ind. App. 311 (67 N. E. 1044); *Street Railway v. Boddy*, 105 Tenn. 666

(58 S. W. 646). In 4 Ruling Case Law 1047, we find the following:

"It is the generally accepted view that one who has alighted from a street car and is in safety upon the highway is no longer a passenger, but is thenceforth a traveler upon the highway, and subject to all the duties and obligations imposed upon such travelers; and the railway company is not responsible to him, as a carrier, for the condition of the street, or for his safe passage from the car to the sidewalk."

On page 1254 of the same volume we find:

"Where street car companies receive or discharge passengers, not at a regular station, but on a public street or highway, as has been seen, it is the general rule that, after a passenger on a street car has safely alighted on the street, the relation of passenger and carrier terminates."

The authorities hereinbefore cited express a reasonable and just rule, though there are some exceptions in the application of the rule. We are satisfied to follow them. We therefore hold that the court did not err in directing a verdict for the defendant in this suit. No actionable negligence was proven, and, therefore, nothing for which the company is liable. Its action is, therefore,—*Affirmed*.

WEAVER, C. J., LADD and STEVENS, JJ., concur.

MARY E. DANIELS, Appellee, v. IOWA CITY, Appellant.

MUNICIPAL CORPORATIONS: Excavations in Street—Jury Question. A jury question on the issue of negligence and contributory negligence is presented by testimony tending to show that, in the sidewalk part of a street, an unguarded excavation, from 6 to 10 feet long, and from 3 to 10 inches deep, had existed for many months, and that plaintiff, unfamiliar with such condition, fell into such excavation on a dark night.

MUNICIPAL CORPORATIONS: Defective Street—Service of Notice of Injury. Service on a city of notice of injury by reason of defective street may be made by taking from the mayor an acknowledgment of service of such notice.

MUNICIPAL CORPORATIONS: Notice of Injury—Jury Issue as to Sufficiency. Evidence reviewed, and held to present a jury question on the issue whether the date of an injury was stated in a notice at the time it was acknowledged by the mayor.

APPEAL AND ERROR: Reservation of Grounds—Sufficiency. The point that testimony was erroneously withdrawn is properly presented by raising the issue in the pleadings, and by entering a specific exception to the instruction.

APPEAL AND ERROR: Review—Insufficient Record. Refused instructions may not be the basis for error, unless such instructions are embraced in the appeal record.

Appeal from Johnson District Court.—RALPH OTTO, Judge.

APRIL 13, 1920.

ACTION for damages resulted in judgment against defendant, from which it appeals.—*Reversed.*

W. R. Hart, Jr., and Bailey & Murphy, for appellant.

Havner, Messer, Clearman & Olsen, and George D. Koser, for appellee.

LADD, J.—I. On the 54th anniversary of her birth, May 2, 1916, the plaintiff started from her home, on Sheridan Avenue, for that of Jacobs, on Oakland Avenue, to pay a promissory note. This was at 8 o'clock in the evening. The rain was falling, so that she carried an umbrella; and the night was dark. She went directly east, four blocks, and turned north on the cement sidewalk on the west side of Oakland Avenue. She had not taken this route before, and, upon reaching the end of the walk, and before reaching her destination, she stepped off into an excavation, and suffered the injury complained of. No

1. MUNICIPAL CORPORATIONS: excavations in street: jury question.

guard or warning was provided by the city, and no trees were near by. The jury might well have exonerated her from the charge of contributory negligence. *Hanson v. City of Anamosa*, 177 Iowa 101; *Scurlock v. City of Boone*, 142 Iowa 684; *Templin v. Incorporated City of Boone*, 127 Iowa 91.

II. The evidence tended to show that, from the end of the walk, there was an excavation, probably for the extension for the sidewalk, 6, 8, or 10 feet long, as wide as the walk, and variously estimated by the witnesses at from the thickness of the cement walk to 10 inches below the top of the walk, immediately north of its end. Some evidence tended to show that dirt had been thrown out at the sides, and that the bottom of the excavation was uneven. Breese, a member of the city council, examined the place, within three days after the occurrence, and testified that he measured the depth of the excavation, and found it to be from $3\frac{1}{2}$ to 4 inches deep; that loose dirt had been thrown against the end of the sidewalk, so as to slope therefrom about 18 inches to the bottom of the excavation; and that, some distance to the north, about a shovelful of dirt had been thrown in. The contractor who put the sidewalk in, testified that the excavation at the end, in the fall of 1915, was 4 inches deep; that dirt was thrown in at the end of the walk, so that, when tramped, it sloped from the top of the walk, north, 8 to 12 inches; that he examined the place, two or three days after Mrs. Daniels fell, and found the excavation a half inch shallower than in the fall; that the excavation was made for a crosswalk, which was not put in; and that, in making it, the earth was thrown back at least 2 feet from the edge, or in the excavation, to level the bottom. This recital is sufficient to demonstrate that the issue as to defendant's negligence was for the jury. That jury might have found the excavation at the end of the sidewalk 6 or 7 inches deep, without earth filled in, as

sworn to by two of the witnesses. This might have been found to have been a dangerous trap for the pedestrian, who had the right to assume that the walk was in a reasonably safe condition for travel, though required to exercise ordinary vigilance for his own protection. *Dunn v. Incorporated City of Oelwein*, 140 Iowa 423; *Hearn v. City of Waterloo*, 185 Iowa 995; *Welsh v. City of Des Moines*, (Iowa) 170 N. W. 369 (not officially reported); *Finnegan v. City of Sioux City*, 112 Iowa 232. There was no error in ruling that the evidence was sufficient to carry the issues to the jury.

III. Section 3447 of the Code Supplement, 1913, declares that an action such as this may not be maintained unless begun within three months after the injury, "unless written notice specifying the time, place and circumstances" is served within 60 days from the happening of the injury; and, if so served, then action may be maintained if commenced within two years. It was not begun until May 1, 1918. If, then, the notice served did not state the time of the injury, the period of limitation was not tolled, and the cause of action was barred by the statute of limitations. Service of notice, specifying the time, place, and circumstances of the injury was acknowledged by the mayor June 23, 1916; and the notice, with such acceptance endorsed thereon, was received in evidence, over objection. There was no error in this ruling; for the attorney preparing the notice swore that the mayor had signed the acknowledgment of service. Such service was sufficient. *McCartney v. City of Washington*, 124 Iowa 382.

But was the date of the injury stated in the notice, when served? The attorney who prepared the notice, being called by defendant, identified a notice precisely like that

2. MUNICIPAL
CORPORATIONS:
defective
street: service
of notice of
injury.

8. MUNICIPAL
CORPORATIONS :
notice of in-
jury : jury is-
sue as to suffi-
ciency.

introduced in evidence, save that the date of the injury was omitted, and "original" was written thereon. On cross-examination, he testified that he had taken the two notices to the mayor at the city hall; that, upon reaching that place, he noticed that the date of the injury had been omitted, and there wrote such date in the one, and handed it to the mayor, who attached his name to the acceptance of service; that he intended to write the date in the other, when the mayor remarked, "I accepted service there," or something to that effect, and handed it back, and retained the other; that he told the mayor to keep the one on which he had written the date, to which the mayor responded that it would make no difference. On redirect examination, he swore that the acceptance, other than the signature, was in his handwriting; that "those words were written, as near as I can remember, at the same time that the words written at the top of the first page 'on May 2, 1916,' as near as I can tell, it is the same ink; as near as I remember, at same time, as near as I can remember, the words 'On May 2, 1916,' is in my handwriting;" and that he did not interline the date afterwards. The mayor, George W. Koontz, recalled having signed the acknowledgment of service, and caused the notice left with him to be filed by the city clerk, and that the word "original" was on it, but was unable to recall whether Koser said anything or made any change in the notice. When asked whether Koser did any writing in his presence, he answered:

"Not that I remember of. Q. As a matter of fact, he had to do some writing after he came over there, because he wrote, among other things, the acceptance of service on this notice, didn't he? A. I wouldn't be positive he wrote it there. I signed it there, though."

He swore further that he had no recollection of Koser's

writing the words "May 2, 1916," on the notice, or that anything was said about the matter. .

"Q. He might have made that statement (writing these words in the notice retained), and you not remember it,—isn't that true? A. I think so. As a matter of fact, I accepted service on not many notices there at City Hall,—occasionally one,—not many. I don't remember that Mr. Koser did any writing in my presence at City Hall. It is possible he wrote in that acceptance, but I am not sure. My best recollection is that Mr. Koser didn't do any writing at the City Hall: that is, as I remember it. I haven't any recollection of his doing any writing there. I didn't see him with a pen, doing any writing at the City Hall,—not as I remember of."

This was controverted by the mayor's testimony that, though present, he had no recollection of the attorney's having written while in his office, or having mentioned the matter, and the circumstance that the notice left contained no date. Though a copy of notice is not required, when service is by acknowledgment, that it omitted the date was significant, as throwing light on the issue as to whether the date was stated in that served. Under Section 3518 of the Code, service of notice by acknowledgment does not exact the delivery of a copy. All that is essential is that acknowledgment of service be dated, signed by the party sought to be served, and endorsed on the notice. We are of the opinion that the issue should have gone to the jury.

IV. Counsel for appellee argues that the defect was not of the sidewalk. If this were admitted, then it would necessarily follow that it must have been of the street. In either event, the notice must have been served within 60 days, to have tolled the statute. *Tewksbury v. City of Lincoln*, 84 Neb. 571 (121 N. W. 994), has bearing on the question, as a glance at the statute there considered will demonstrate.

V. The contention that the point was not properly raised is without foundation. The issue was raised by answer. The court told the jury that:

"The court has withdrawn from your consideration the testimony as given by the witness Koontz, and by the witness D. T. Davis, and the same should not be considered by you in arriving at your verdict."

4. **APPEAL AND
ERROR: reserva-
tion of grounds:
sufficiency.**

This was the first paragraph of the eighth instruction, and it was excepted to as "the first paragraph" thereof; and this assignment of error was that the court erred in withdrawing the testimony of these witnesses, stating the page and line where the exception to the instruction was printed therein. This was in compliance with the statute, as construed by *Anthony v. O'Brien*, 188 Iowa 802. Koontz was the mayor, and the only testimony given by him is that previously referred to. As pointed out, it was sufficient, with the notice left with him, to raise the issue as to the sufficiency of the notice served. This being so, there was error in excluding his testimony; for, if it had been considered, that issue must have gone to the jury.

Complaint is made of the refusal to give an instruction. We do not find it in the record, nor any exception thereto, save generally to the refusal of the court "to give the two instructions requested by the defendant."

5. **APPEAL AND
ERROR: review:
insufficient
record.**

This is insufficient, as appears from the last-cited cause. Appellee suggests that the statute of limitations involved is unconstitutional. As the point does not appear to have been raised in the district court, it is not considered.

Because of the error in withdrawing the testimony of Koontz, and not submitting sufficiency of the notice, when served, to the jury, the judgment is—*Reversed*.

WEAVER, C. J., GAYNOR and STEVENS, JJ., concur.

DES MOINES UNION RAILWAY COMPANY, Appellee, v. CHICAGO
GREAT WESTERN RAILWAY COMPANY, Appellant.

CONTRACTS: Construction—Agreement to Pay "Taxes" and Assessments. An agreement by a tenant to pay "all taxes or assessments, special or otherwise, and public charges of every kind and nature that shall or may be taxed or assessed against the owner or his property," is not so all-embracing and sweeping as to include Federal *income* or excise taxes, levied under subsequently enacted statutes.

SALINGER, J., dissents.

CONTRACTS: All-Embracing Words Limited by Context and Circumstances. Words which are all-embracing and sweeping in their *possible* meaning may reveal a much lesser meaning when the *natural import* of such words is kept in mind, and when they are read in the light of the context and the attending facts and circumstances. So held where an agreement by a tenant to pay "taxes" and "assessments" was held not to include the payment of *income* or *excise* taxes, levied under laws passed subsequent to the agreement.

TAXATION: "Tax" Defined. The term "tax" ordinarily embraces no more than the customary and annual taxes. So held where an agreement by a tenant to pay all "taxes and assessments" was held not to include Federal income or excise taxes.

Appeal from Polk District Court.—THOMAS J. GUTHRIE,
Judge.

APRIL 13, 1920.

THE opinion states the case.—*Reversed.*

Carr, Carr & Evans, for appellant.

Parrish & Cohen, for appellee.

WEAVER, C. J.—The plaintiff is a corporation, owning a railway, and, in connection therewith, certain terminal facilities in the city of Des Moines. The defendant is also

1. CONTRACTS :
construction :
agreement to
pay "taxes"
and assess-
ments.

a corporation, owning and operating a line of railway extending from Chicago, in the state of Illinois, to and through the city of Des Moines, and thence to Kansas City, in the state of Missouri. In the record before us, the plaintiff is spoken of as the "Des Moines Company," and the defendant as the "Chicago Company," and, for convenience, they will be so designated in this opinion.

On July 2, 1896, the plaintiff and the corporation then owning the Chicago railway entered into a written contract, by which the Chicago Company was granted the right to the use of a portion of the property of the Des Moines Company, located in the latter city, and the Des Moines Company, on its part, also undertook to render certain services for the Chicago Company. The contract was to continue in force for the term of 25 years. Among the stipulations of said contract is one upon the proper interpretation and effect of which this case is made to turn. The ninth section or clause of the contract sets forth the considerations which the Chicago Company is to render or pay to the Des Moines Company for the agreement so entered into by the latter. Among these considerations are the following:

"9. The Chicago Company, in consideration of the grants and provisions hereof, agrees to pay to the Des Moines Company in the manner and at the times herein-after specified, the following sums, to wit: * * *

"5th. One third of all taxes or assessments, special or otherwise, and public charges of every kind and nature that shall or may be taxed or assessed against the Des Moines Company or its property during the aforesaid term of years. * * *"

Provision was further made for the keeping and rendering of mutual accounts, and for monthly payments.

Later, the Chicago Company, named in this contract, was succeeded in the ownership and control of said rail-

way by the defendant in this case, and, by agreement thereafter made between plaintiff and defendant, the latter assumed the liability of its predecessor thereunder.

This action is brought at law by the Des Moines Company, to recover an amount which it alleges is due and payable to it under the terms of said contract. The alleged facts upon which that claim is founded, as stated in the petition, are that, in each of the years 1914, 1915, and 1916, the United States of America assessed against plaintiff and its property an income tax, aggregating for said three years the sum of \$6,263.18, which assessments have been paid and discharged in full by the plaintiff, and that defendant thereby became charged with the duty, under its contract above quoted, to repay to the plaintiff the one-third part of said levies. The petition further alleges that, in the year 1917, the United States assessed against the plaintiff an excise tax on the estimated value of its capital stock, to the amount of \$428.50, and thereafter, a further tax of like character for the year 1918, to the amount of \$938.50, all of which has been paid by the plaintiff, and for one third of which amount it demands a recovery from the defendant.

To this petition the defendant demurred, on grounds which may be briefly stated as follows: That the defendant's covenant, as shown by reference to the contract, does not provide for payment by it of the income taxes or excise taxes imposed on the plaintiff by the Federal government, nor is such obligation in any manner to be implied from the terms of the contract, nor does the language thereof evidence any such intent.

The trial court overruled the demurrer, and defendant, electing to stand thereon, declined to plead over, and excepted to the ruling. Judgment was thereupon entered in plaintiff's favor for the amount of its demand, and defendant appeals.

The particular clause of the contract on which the

plaintiff's claim is based, is in the above-quoted agreement of the defendant "to pay one third of all taxes or assessments, special or otherwise, and public charges of every kind and nature that shall or may be taxed or assessed against the Des Moines Company or its property during the term."

The demurrer admits the making of the contract and defendant's obligation to contribute to the payment of the taxes therein specified, but it is contended that such agreement does not cover or include the income tax or excise tax imposed by the United States and paid by the appellee. It is this question of construction to which we must address ourselves.

I. "Taxes," "taxation," and "assessments" are words in very common and familiar use, the meaning and effect of which are not ordinarily open to serious question; but, like most other words in our language, their scope and application vary according to the nature of the subject under discussion and the circumstances under which they are used. Taxation, in its broadest and most general sense, includes every charge or burden imposed by the sovereign power upon persons, property, or property rights, for the use and support of the government, and to enable it to discharge its appropriate functions; and in that broad definition there is included a proportionate levy upon persons or property, and all the various other methods and devices by which revenue is exacted from persons and property for public purposes. It is only occasionally, however, that the word "tax" or "taxation" is used in this all-embracing and sweeping sense, and legislatures, courts, and the people have come to differentiate between "general" taxes, "ordinary" taxes, "property" taxes, "excise" taxes, "inheritance" taxes, "occupation" taxes, "special" taxes or assessments, "franchise" taxes, "poll" taxes, "license" taxes, "income" taxes,

"excess profits" taxes, and various other methods by which contributions to the public revenues are enforced.

When, therefore, we are called to consider a contract in which one party has covenanted with another to pay taxes, and the question arises as to the scope and extent of that obligation, the terms of the covenant

2. CONTRACTS : all-
embracing
words limited
by context and
circumstances.

are, ordinarily, open to construction. The end and purpose of the construction of an agreement are to arrive at the real meaning and intent of the parties. To that end, we must consider first the natural import of the words or language the parties have chosen for its expression, and read it in the light of its context, as well as in the light of the circumstances under which it was made. Thus reading the contract before us, we are brought to inquire whether the words "taxes" and "assessments" must be given their broadest and most general signification, or whether the intent of the parties will be better effectuated by so limiting them as not to include the income tax and excise tax which the plaintiff has been required to pay. At the time when the contract was made, and for a considerable period of years thereafter, there was no law requiring payment of either an income tax or excise tax, nor was there any apparent reason for anticipating such a change in the policy or manner of raising public revenues. This fact alone would probably not be a sufficient answer or defense to the plaintiff's claim, but it is one of the pertinent facts or circumstances which the court may consider, as bearing upon the intent of the parties. *Love v. Howard*, 6 R. I. 116; *Second Univ. Society v. City of Providence*, 6 R. I. 235. See, also, as to the bearing of such fact upon the question of the intent of the parties, *King v. Raab*, 123 Iowa 632, 636.

In *Bolling v. Stokes*, 2 Leigh (Va.) 178, decided by the Virginia court, a lessee covenanted with the owner of the property to pay a specified yearly rent, "besides all taxes

and other public dues in any manner accruing" upon the premises, which rent should be paid half yearly, "besides taxes and public dues of every kind." During the term of the lease, the street was paved, and the cost assessed upon the property. The lessee paid the assessment, and later, sued the owner to recover the expense so incurred. In sustaining the plaintiff's right to recover, the court says that "the words in the covenant are very strong," but they "may be satisfied by the application of them to the ordinary and usual taxes and public dues. To extend them to an expense unknown by the parties, incalculable as to amount, uncertain as to time, and in which the lessee could have no certain interest, would be to disregard all the circumstances under which the contract was made. * * * There was nothing by which it could be estimated, like the usual and customary taxes and public dues. * * * It was an uncertain and extraordinary assessment."

The Massachusetts court, speaking upon the subject, says:

"In a covenant for payment of taxes by a lessee, it is to be ascertained by construction what was contemplated by the parties in the use of the terms employed. Those terms are not necessarily to be taken in their strict legal signification." *Harvard College v. Aldermen of Boston*, 104 Mass. 470, 483.

Further discussing the matter of construction, it is said, in the same case, that:

"It may be affected by the character, situation, and condition of the estate, the mode and purpose of occupation by the tenant, and by all the circumstances of the particular case. Much consideration is sometimes given to the consideration that the assessment in question is of a kind in use or authorized at the time the covenant was entered into, or, on the other hand, of a novel or newly authorized nature."

This is not to deny that, where the words of the con-

tract appear to have been chosen advisedly, and are such as clearly indicate a mutual intent to provide for all possible forms of taxation, such intent will be given

3. **TAXATION:**
"tax" defined. effect by the courts. Such intent is not, however, conclusively established by the use of sweeping, general terms, if, by a proper application of the rule of *ejusdem generis*, or other recognized canon of construction, the covenants of the parties "may be satisfied by the application of them" to less burdensome obligations. *Bolling v. Stokes*, supra.

In an English case, *Jeffrey v. Neale*, L. R. 6 C. P. 240, the court, speaking of a lessee's covenant, says:

"It has frequently been held that, in cases of this nature, some amount of qualification must be placed on words which, at first sight, might be capable of a very extensive signification."

For example, it has been held that a covenant to pay "all taxes and other public dues" imposes no obligation to pay other than the customary and annual taxes and public dues. See *Bolling v. Stokes*, supra.

So, also, it is held that a covenant to pay "all and every United States, state, and local taxes, duties, and imposts" does not include special assessments (*Pettibone v. Smith*, 150 Pa. St. 118 [24 Atl. 693]), although it is there admitted that such assessments are levied by virtue of the taxing power of the state, and do constitute a species of taxation.

In *Love v. Howard*, supra, decided by the Rhode Island court, the same rule was applied to a covenant which bound the tenant to pay "all assessments and taxes of every kind." So, too, an agreement to pay "all taxes, assessments, and municipal or government charges, general and special, ordinary and extraordinary, of every nature and kind whatsoever, which * * * during the life of this lease becomes payable (a) levied, imposed, or assessed upon any land hereby demised; or (b) levied, imposed, or assessed

upon any interest of the lessor in or under this lease; or (c) which the lessor shall be required to pay by reason of or on account of his interest in said land and improvements or in or under this lease," does not impose upon the lessee any obligation to pay an inheritance tax which had been exacted by the state from the lessor's executor during the term of the lease. Other precedents along this line are not wanting, and the rules of construction to which we have adverted are well established.

The cases cited sufficiently illustrate the solicitude of the courts to ascertain and give effect to the real intent of the contracting parties. In performing that duty, the court will, to the best of its ability, place itself in the situation occupied by the parties when the contract was made, "so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described." *Nash v. Towne*, 72 U. S. 689; *Canal Co. v. Hill*, 15 Wall. (U. S.) 94.

Were the concrete question, in the form here presented, an entirely new one, it would fall readily within the scope of the principles illustrated by the cited precedents, and compel the conclusion that payment of an income tax which might possibly be levied under some law not yet in being was not within the contemplation of the parties, and is not required by the terms of the covenant. But we are not left to dispose of the matter as one of first impression, and, in so far as the courts have spoken, they are in harmony with the conclusion here stated.

First in order of time, so far as our investigation has gone, we have the case of *Van Rensselaer v. Dennison*, 8 Barb. (N. Y.) 23. There, the lessee in a perpetual lease covenanted to pay "all ordinary and extraordinary taxes, charges, and assessments," and this undertaking was held not to include any obligation to pay the taxes assessed

against the landlord upon the rents payable to him. The rule so applied was confirmed in *Woodruff v. Oswego Starch Factory*, 70 App. Div. (N. Y.) 481, and recognized, also, in *Robinson v. County of Allegheny*, 7 Pa. St. 161. Later, the *Woodruff* case appears to have reached the court of last resort in New York (see 68 N. E. 994), and the judgment below was affirmed. The covenant in that case was much broader and more inclusive in its terms than is the one we are now considering. The tenant there agreed to pay "all taxes, charges and assessments, ordinary and extraordinary, which shall be taxed, charged, imposed or assessed on the hereby demised premises and privileges, or any part thereof, or on the said parties of the first part (the lessors), their heirs and assigns, in respect thereof." The court, though expressly recognizing that, in legal theory, it may be said that a tax upon rents or income from real estate is, in a sense, a tax upon land, holds that such taxes are not within the covenant. The fact that the court in that case lays some stress on the effect of an act of the legislature making such rents or income a distinct item for the purposes of taxation, does not, in principle, differentiate the question there decided from the one in this case, but rather makes more complete their parallelism, because the effect of the Federal income tax is, in all respects, similar to that which was occasioned by the New York statute, in that it segregates or sets apart the income, as a distinct or separate item for taxing purposes.

Later, the same question came before the Pennsylvania court, under circumstances not materially unlike those admitted by the demurrer in this case. *Catawissa R. Co. v. Philadelphia & R. R. Co.*, 255 Pa. St. 269. There, the Catawissa Railroad Company leased its road and equipment to the Philadelphia & Reading Company for a long term of years. By the terms of the lease, the latter company undertook to pay "all taxes, charges and assessments which, dur-

ing the continuance of the term hereby demised, shall be assessed or imposed under any existing or future law on the demised premises or any part thereof, or on the business there carried on, or on the receipts, gross or net, derived therefrom, or upon the several issues of bonds or the interest thereon, or upon capital stock of the Catawissa Company or the dividends thereon, or upon the franchises of said company, for the payment or collection of any of which said taxes the Catawissa Company may otherwise be or become liable or accountable under any lawful authority whatever." As in the case at bar, the lessor company was subsequently assessed with an income tax under the Federal statute, and, having paid, it brought action to recover the amount from the lessee. The case thus stated is, to use a common expression, "on all fours" with our own. As in our case, also, the trial court held with the leasing company, that the tenant company was liable. On appeal, that judgment was reversed, on the ground that an income tax levied on the rents paid to the lessor is not, in any proper sense, imposed upon the demised premises, nor on the business there carried on, nor on the receipts, gross or net, derived therefrom, nor upon the capital stock of the lessor company, or the dividends thereon, nor on the franchises of that company.

Still more recently, a like case arose in Massachusetts (*Codman v. American Piano Co.*, 229 Mass. 285 [118 N. E. 344]). There, the lessee covenanted to pay "all taxes and assessments whatsoever which may be payable for or in respect of the leased premises during the term thereof, except assessments for betterments." A Federal income tax having been assessed to and paid by the lessor, suit was brought therefor against the tenant. In a previous case, that court had permitted a recovery by the landlord against his tenant for income tax paid, because, by the express terms of the lease, the latter had agreed to pay all taxes, including those

"levied upon or in respect of the rent payable" under the contract (*Suter v. Jordan Marsh Co.*, 225 Mass. 34); but, there being no such covenant in the *Codman* case, a recovery was denied. Discussing the question, the court says, in the *Codman* case, at page 290:

"Manifestly, taxes upon the real estate come within the terms of the covenant. * * * On the other hand, we cannot construe the phrase in question as including within its terms a tax assessed by the Federal government to the lessor upon the rents reserved under the lease. Such an assessment is upon an entirely distinct kind of property than is the assessment upon the real estate. While, under the Federal income tax law, a tax on rent is a tax on land, and so a direct tax, yet a tax on land is not a tax on rent; the defendant did not covenant to pay taxes for and in respect of the rent; his undertaking is to pay the taxes for or in respect of the premises. * * * In construing the covenant, it is plain that taxation upon real estate means one thing, and taxation upon income means another. * * * The fundamental fact on which the rights of the parties depend is that the defendant never agreed to pay the taxes on the rent. * * * The words chosen by the parties cannot fairly be extended by us beyond their natural or ordinary meaning, and therefore the defendant cannot be held liable for taxes which the covenant, neither by express words nor reasonable implication, obliged him to pay."

In the case from which we have quoted, the plaintiff, as does counsel for appellee in this case, lays much stress on language used by the Supreme Court of the United States in *Pollock v. Farmers' L. & T. Co.*, 157 U. S. 429, to the effect that "a tax upon the income from real estate is a tax upon the real estate itself;" and from this it is argued that the appellant's general undertaking in the lease to pay one third of "all taxes and assessments, special or otherwise, and public charges of every kind and nature," must, there-

price of the privilege to engage in a given line of trade or business. 3 Words and Phrases 2548.

The Federal statute in question, Act of Congress of September 8, 1916, appears to employ the word more nearly in the latter sense; for it is therè described as a "special excise tax with reference to the carrying on or doing business by such corporation." It is not a tax upon the leased property in the hands of the tenant, nor a tax upon the tenant's business, nor is it exacted of the tenant as a condition or price of its right or privilege to use the demised premises. It is, at most, a condition placed upon the right of the plaintiff corporation to do business of any kind, whether the business be with the defendant or with any third party, or be business with reference to the terminal facilities leased to the defendant, or to any separate and distinct matter or enterprise in which it sees fit to engage, wholly foreign to the business relations between lessor and this lessee. It is sufficient to say that the plaintiff's covenant does not contemplate payment of such a charge. The question is touched upon in *Jersey City Gas Light Co., v. Union Gas Imp. Co.*, 46 Fed. 264, which is affirmed in 7 C. C. A. 250. There, the lessee of the plaintiff company had undertaken to pay "all assessments and taxes on the real and personal property, franchises, capital stock or gross receipts of the lessor." Plaintiff having been required by statute to pay a certain percentage of its gross receipts "by way of license for its corporate franchise," it was held that the tenant was not liable for its repayment. The court denied the plaintiff's theory that the tax or fee paid was in the nature of a franchise tax, and therefore chargeable to plaintiff, under the express terms of the lease, but held it was, rather, a charge or tax exacted by way of a license to do business, and therefore not recoverable. See, also, *Chesapeake & O. R. Co. v. Louisville & N. R. Co.*, 154 Ky. 637 (157 S. W. 1107).

For the reasons stated, we hold that the plaintiff is not

entitled to recover upon either item of its claim, and that the trial court erred in overruling the demurrer to the petition. The judgment appealed from is, therefore,—*Reversed*.

EVANS, GAYNOR, PRESTON, and STEVENS, JJ., concur.

SALINGER, J., dissents.

HARVEY FLEAGLE, Appellant, v. J. M. GODDARD, Executor,
Appellee.

LIBEL AND SLANDER: Privilege Attending Affidavit in re Pensioner. An affidavit bearing on the health, mental condition, disposition, and habits of a pensioner of the United States, prepared under the orders and in accordance with the directions of the Federal commissioner of pensions, is at least qualifiedly privileged, and no action for libel will lie thereon, in the absence of evidence by plaintiff that the affiant was actuated by malice.

Appeal from Cedar District Court.—JOHN T. MOFFIT, Judge.

APRIL 13, 1920.

ACTION for damages on account of certain alleged slanderous and libelous statements of the defendant concerning the plaintiff. There was a directed verdict for defendant, and plaintiff appeals.—*Affirmed*.

Sharon, Harrison & McSwiggin, for appellant.

J. C. France and C. O. Boling, for appellee.

STEVENS, J.—Plaintiff alleged in his petition that he enlisted in the United States Army in 1898, and served in the Spanish-American War; that, while thus engaged, he incurred disabilities, as the result of a sunstroke, for which he was allowed and paid a pension of \$24 per month; that,

as the result of certain oral and written defamatory statements, uttered and published of and concerning the plaintiff by the defendant, his pension was reduced to \$12 per month, and he was caused to suffer great mental pain, humiliation, disgrace, etc. He asks judgment in the sum of \$25,000.

The writing complained of is an affidavit, prepared by a special examiner of the United States pension office, and signed and verified by defendant, and is set out in full in the abstract. Defendant, among other defenses, pleaded, and now urges in argument, that the publication was absolutely privileged, and that an action for libel cannot be predicated thereon.

No transcript of the evidence was made and filed in the office of the clerk of the district court, and only the deposition of the United States pension commissioner and the testimony of J. J. Horrigan, special agent of the department, are before us. We cannot, therefore, consider or review the alleged oral defamatory statements of the defendant. It appears without conflict in the record, however, that plaintiff's pension was, on or about the 11th day of January, 1916, following an investigation by the pension office, reduced from \$24 to \$12 per month. Referring to the writing in question, the court, upon a former appeal of this case, *Fleagle v. Downing*, 183 Iowa 1300, said:

"The matters complained of in the second count of the petition, if believed to be true, would lead the mind to the conclusion that the plaintiff, knowing he had suffered no disability while in the service of his country in the Spanish-American War, had fraudulently procured a pension from the government for disabilities not sustained,—clearly charging the plaintiff with defrauding the government, and with obtaining property by false pretenses, a criminal offense which lays the foundation of a civil action, if unfounded, untrue, and maliciously made."

Unless, therefore, appellee's claim of privilege is sustained, plaintiff was entitled to have this count of his petition submitted to the jury. A privileged communication is defined in Newell on Slander and Libel (3d Ed.), Section 492, as follows:

"A privileged communication is a communication which, under ordinary circumstances, would be defamatory, made to another in pursuance of a duty, political, judicial, social, or personal; so that an action for libel or slander will not lie, though the statement be false, unless, in the two last cases, actual malice be proved in addition."

And in the following section, the principle upon which the doctrine rests is stated as follows:

"The great, underlying principle upon which the doctrine of privileged communications rests is public policy. This is more especially the case with absolute privilege, where the interests and the necessities of society require that the time and occasion of the publication or utterance, even though it be both false and malicious, shall protect the defamer from all liability to prosecution for the sake of the public good. It rests upon the same necessity that requires the individual to surrender his personal rights, and to suffer loss for the benefit of the common welfare. Happily for the citizen, this class of privilege is restricted to narrow and well-defined limits. Qualified privilege exists in a much larger number of cases. It extends to all communications made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty to a person having a corresponding interest or duty; and the privilege embraces cases where the duty is not a legal one, but where it is of a moral or social character, of imperfect obligation. The occasion on which the communication was made rebuts the inference of malice *prima facie* arising from a statement prejudicial to the character of the plaintiff, and puts upon

him the burden of proving that there was malice; in short, that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made."

It appears from the deposition of the commissioner of pensions, which was introduced by plaintiff, that, on or about the 25th day of February, 1914, C. F. Simmermaker, mayor of Tipton, wrote the pension office, suggesting an examination of plaintiff for the purpose of ascertaining whether he was entitled to the pension he was receiving, and that, on September 19th, he again wrote the department, to the same effect. On May 7, 1915, J. J. Horrigan, a special examiner of the pension office, acting under written instructions from the department, visited Tipton, for the purpose of making an investigation as to the health, mental condition, and habits of plaintiff. In addition to directing him to obtain medical testimony as to plaintiff's condition, Horrigan was instructed to procure the statement of lay persons, as follows:

"Lay persons who have been in a position to know of his condition during the last year should be questioned as to whether he has performed any manual labor during this time. If so, the nature and the approximate extent of the work done should be ascertained. Has he manifested symptoms of mental impairment? Is he absent-minded, or is his memory impaired? Is he excitable, disputatious, and easily aroused to anger? Is he morbid or melancholic? Does he now do market gardening? If so, does he do the greater part of his work himself? If he hires his work done, is it believed to be necessary, by reason of physical inability to do it himself, or is he indifferent and disinclined to work? Is he generally regarded as being of unsound mind? Does he look after his own business affairs with ordinary success? What are his habits with reference to the use of alcoholics?"

Among other citizens interrogated by Horrigan was defendant, who, according to his testimony, somewhat reluctantly answered numerous questions propounded to him. The witness testified that the affidavit was made up and written by him from the answers to the questions propounded, and covered only the matters referred to in the written instructions from the department.

It is contended by counsel for appellant that the defendant voluntarily signed and swore to the statements complained of; that Horrigan had no authority to compel him to impart information, or make any statements concerning plaintiff; and that the proceedings before him were neither judicial nor quasi judicial in character; and that the publication is neither absolutely nor qualifiedly privileged.

It appears, however, as stated above, that Horrigan was authorized and instructed by the commissioner of pensions to inquire of both medical and lay witnesses concerning the health, apparent mental condition, disposition, and habits of plaintiff; and, if the statements complained of were made by defendant without malice, and with the reasonable belief that same were true, as they were made to the representative of the pension department of the government, in the public interest and for the public good, and in the discharge of his duty as a citizen, they were at least qualifiedly privileged. *Long v. Peters*, 47 Iowa 239; *Rainbow v. Benson*, 71 Iowa 301; *Richardson v. Reps*, 136 Iowa 670; *Cherry v. Des Moines Leader*, 114 Iowa 298; *Gatewood v. Garrett*, 106 Va. 552; *Bodwell v. Osgood*, 3 Pick. (Mass.) 379; *Konkle v. Haven*, 140 Mich. 472; *Kirkpatrick v. Eagle Lodge*, 26 Kans. 384. The doctrine of qualified privilege operates only, however, to destroy the presumption of malice, and to impose upon the plaintiff the burden of proving same. *Morse v. Times-Republican Printing Co.*, 124 Iowa 707; *Cherry v. Des Moines Leader*, supra; *Ott v. Murphy*,

160 Iowa 730; *Nichols v. Eaton*, 110 Iowa 509; *Children v. Shinn*, 168 Iowa 531. The burden of proving malice, therefore, rested upon the plaintiff. Malice may be shown by extrinsic facts and circumstances, or may be inferred from the publication itself. *Nichols v. Eaton*, supra; *Morse v. Printing Co.*, supra.

The motion for a directed verdict was based upon numerous grounds, in addition to the claim of defendant that the publication was privileged, among which was that the evidence wholly failed to show malice; that, on the record as a whole, a verdict for plaintiff could not be sustained, if returned by the jury; that there is nothing in the record in any way connecting the defendant with the complaints made to the pension office concerning plaintiff's pension, or showing that the defendant did not act in good faith in signing the affidavit.

So far as appears upon the record before us, the statements contained in the writing in question may have been true; and we find nothing to indicate that defendant made them without reasonable grounds for believing the same to be true, or that he acted maliciously, unless this appears upon the face of the writing.

The affidavit, as stated, was written by Horrigan, and was based upon answers to questions propounded by him to defendant, in the course of his duty as a special agent of the United States pension office, and for the sole purpose of enabling the department to determine whether plaintiff's pension should be discontinued or reduced; and there is nothing in the language of the affidavit, considered in connection with the occasion upon which same was uttered, to justify an inference of malice. Unless such inference may be drawn therefrom, this issue could not properly have been submitted to the jury. *Cherry v. Des Moines Leader*, supra.

It is not sufficient, to require a reversal of the ruling of

the court below in directing a verdict, that parts of the evidence tending to show facts that would justify the submission of the case to the jury were introduced, but the evidence as a whole, bearing thereon, must be set out in the abstract. *Kitzman v. Kitman*, 115 Iowa 227.

The record upon which the trial court acted is not before us, and we cannot say that error was committed in the ruling upon the motion to direct a verdict. There appears to have been some confusion or misunderstanding on the part of counsel for appellant as to the grounds upon which the motion was sustained, as shown by the record in the court below, appellant contending that the sole ground upon which the court based its ruling was that the affidavit was absolutely privileged, and that the record is sufficient to show error in the ruling of the court upon the motion.

The record as certified to this court by the clerk shows, however, that the motion was sustained generally. We cannot go behind the record. For the reasons stated, the judgment of the court below is—*Affirmed*.

WEAVER, C. J., LADD and GAYNOR, JJ., concur.

JOHN GOMPERT, Appellee, v. MATT FROST, Appellant.

VENDOR AND PURCHASER: Contract of Sale (?) or Option (?)

- 1 Instrument analyzed, and, in connection with attending circumstances, held to constitute a contract of sale, even though uniformly designated as an *option*.

CONTRACTS: Practical Construction of Ambiguous Contract. The

- 2 practical construction placed by the parties on an ambiguous contract is persuasive on the issue of legal construction, and, in connection with the attending circumstances, may be quite controlling. So held on the question whether a writing was a *contract of sale* or a *naked option*.

APPEAL AND ERROR: Submitting Construction of Contract to

- 3 Jury. The erroneous submission to the jury of the *intent* of

the parties in entering into a writing is harmless, when the finding of the jury was precisely what the court must have found, as a matter of law, from the writing.

Appeal from Waterloo Municipal Court.—W. N. BIRDSALL,
Judge.

APRIL 13, 1920.

ACTION at law to recover commission alleged to have been earned by the plaintiff in the sale of defendant's farm. There was a jury trial, and verdict and judgment for plaintiff. Defendant appeals.—*Affirmed.*

Mears & Lovejoy, for appellant.

Sager, Sweet & Edwards, for appellee.

WEAVER, C. J.—The defendant, being the owner of a farm in Black Hawk County, listed it for sale with the plaintiff, a real estate dealer and agent, and agreed that, in the event of a sale procured by the agent, he would pay a commission of \$2.50 per acre. One Fobian applied to the plaintiff to obtain a lease of the farm, but was induced by plaintiff to consider the question of buying the property, instead of leasing it. Thereupon, plaintiff introduced Fobian to the defendant, as a prospective buyer. After some talk between them, defendant took Fobian to his house, exhibited the property to him, and the negotiations thus begun resulted in the execution of a written contract. The nature and effect of such contract, whether an agreement of sale or a mere option to Fobian to purchase in the future, are matters upon which counsel do not agree. On the theory that the contract was one of sale, plaintiff brings this action to recover the agreed commission. In his answer, the defendant admits no more than the listing of the land for sale with the plaintiff, and in all other respects denies the claim made against him.

1. VENDOR AND
PURCHASER:
contract of
sale (?) or
option (?)

The contract between defendant and Fobian is dated January 16, 1919, and provides in terms that the former gives and grants unto the latter "the option to purchase the farm [describing it] for the sum of \$60,217.50 to be paid as follows: \$2,217.50 cash in hand." Time for the expiration of the alleged option is not expressed, but a provision is inserted for its renewal on March 1, 1920, "by payment of \$2,900 interest and \$2,100 principal;" again, on March 21, 1921, "by payment of \$2,795 interest and \$2,205 principal;" and again, on March 1, 1922, "by payment of \$2,684.75 interest and \$2,315.25 principal;" and again, on March 21, 1923, "by payment of \$2,568.98 interest and \$2,431.02 principal."

The writing then further provides that, on March 1, 1924, Fobian "will pay to the party of the first part \$48,948.73 principal and \$2,447.43 interest;" will pay all taxes assessed against the land for the year 1919 and subsequent years, and keep the buildings, insured in the name of the defendant, "as his interest may appear." Fobian still further undertakes to bring upon the premises personal property free from incumbrance, to the value of \$4,000, and to give defendant a chattel mortgage thereon, "to be used as part payment or security of the foregoing option." Provision is also made by which the option may be accepted and settlement made for the land at any time, and by which any sums paid for the consideration of the option or renewal thereof, except payments of interest, shall be deducted from the purchase price. The concluding clause of the agreement is as follows:

"When the purchase price has been fully paid as aforesaid, and the conditions of this contract fully performed, then the party of the first part agrees to convey said premises to the party of the second part by good and sufficient warranty deed conveying a good title clear of all incumbrance except taxes as stated."

Though nothing is expressly said as to the possession of the property, it satisfactorily appears from the record that an immediate delivery of the premises to Fobian was contemplated and made, and, so far as appears, Fobian is still in possession, carrying out the terms of the contract of sale.

I. Is this agreement, upon its face and as a matter of law, a contract for the sale of the land, or is it a mere option to Fobian to make such purchase, if he so elects? Appellant affirms the latter theory; while appellee contends that, if the agreement be not clearly and conclusively a contract of sale, it is of such ambiguous and uncertain character that the jury could properly find, under all the testimony, that it was so intended by the parties.

For the purposes of this case, it may be admitted at the outset that an agent for the sale of land, or for the production of a person ready, willing, and able to buy on the authorized terms, does not earn his commission by producing a customer who does no more than to take or obtain an option to buy. What, then, is the nature of this agreement, concerning the written terms of which there is no dispute? The writing in question is made to name or describe itself as an "option," but the name or label attached to an instrument does not always or necessarily determine the real nature or effect of its contents. An option for the purchase of land is a mere privilege or right which the owner confers upon another person to become, at his own election, the purchaser of the property, on stated terms, within a stated period of time. The holder of such an option is in no sense a purchaser. He acquires thereby no right, title, or interest, legal or equitable, in or to the land. He has no right of possession or control. He may, within the time agreed upon, utilize his privilege to buy, tender performance of the terms, and demand a conveyance; but this is a matter of his own choice, and he may permit the option to expire,

without incurring any liability therefor to the owner. *Hopwood v. McCausland*, 120 Iowa 218, 221; *Myers v. Stone & Son*, 128 Iowa 10, 12; *Sweezy v. Jones*, 65 Iowa 272.

Brought to the test of these principles, the contract in the case now under consideration is hardly open to reasonable doubt. It provides for much more than a right or privilege in Fobian, at his election, thereafter to be made, to buy the property at a given price. Taken as a whole, it clearly provides for the actual sale of the land for \$60,217.50. Though not so stated in express words, it will be seen, by analysis of its terms, that it was treated as a sale, from the date of the instrument. A cash payment was to be made at that time; further yearly payment was to be made on each succeeding March for four years, together with yearly payments of interest. *Interest on what?* Not interest on the price of the option, surely, but the accruing interest on the entire, agreed price of the land. At the end of four years, the remainder of the purchase money was to become due. True, the cash payment and yearly installments, amounting to \$5,000 annually, are described as payments for the option and its renewal; but it is further expressly agreed that all these payments shall, in settlement, be credited as payments upon the price of the land, and that, "when the purchase price has been fully paid, as aforesaid," deed of conveyance is to be made. The purchaser went into possession at once, not as a tenant, nor as a tenant with option to purchase, but as purchaser, and was required by the contract to further secure the seller by chattel mortgage on at least \$4,000 worth of personalty. It is not necessary, for present purposes, to inquire or decide whether, upon failure of Fobian to pay one or more subsequently accruing installments, according to his contract, defendant could immediately dispossess him, or would be required to proceed by foreclosure, or other legal or equitable proceedings, to enforce the contract. It is to be noted, however, that the con-

tract places no price on the option to buy, as distinguished from the purchase price of the land, nor is any forfeiture of any kind provided for upon default in any of the payments. If, however, it be said that the use of the word "option" by the parties to the contract indicates or implies an agreement that such failure should work a forfeiture of Fobian's rights, such a holding would not serve to convert the contract into an option. It is, at most, simply the familiar contract of sale, with provision for forfeiture. A contract for sale of land may be so drawn as to be, to a degree, one of unilateral obligation,—that is, the selling price may be fixed, and made payable in successive installments, with an agreement that default made in an installment shall work a forfeiture of the purchaser's rights in the property, without further liability on his part, except the loss of payments already made; but such an agreement does not constitute an option, within the meaning of the law, nor is any such agreement here shown. The courts have quite often to deal with contracts for the sale of land ingeniously framed to pass muster as "options," sometimes for the apparent purpose of avoiding taxation for moneys and credits, and at other times to enable the seller to have the advantage of what is, in effect, a summary foreclosure of the purchaser's rights, without redemption, in case of his default; but such contracts, however effectual they may be in providing for forfeiture by purchasers, have no effect, we think, to transmute a contract of purchase and sale into a mere option, which, until acted upon and accepted, vests no right of property or right of action in anyone.

In this case, Fobian did not acquire simply a naked right to purchase, if he should so elect. His election was made at the very threshold of the transaction. He made a substantial payment down upon the purchase price. He acquired possession. He paid interest on the full, agreed price of the land, from the date of the agreement. He se-

cured further payment by chattel mortgage on his own property. He paid taxes and insurance. There was no price or consideration for the alleged option, except the agreed price of the land; and, under his contract, for every dollar paid by him to the defendant, he was entitled to credit on the contract price.

That the contract was intended as one for a sale of the property, we cannot doubt. Such being the case, the plaintiff having, by his agency, found and introduced the purchaser to the defendant, his right to the agreed commission was complete, subject only to the defendant's contention, if duly established, that payment of such commission was to be made in installments, as payments by Fobian of the price of the land should mature. Quite in point, upon the principal point here discussed, is *McGregor v. Ireland*, 86 Kans. 426 (121 Pac. 358).

II. There is another angle of view from which the same result may fairly be reached. If not, as we have held, clearly a contract of purchase, it is, to say the least, such a wide departure from the form and substance of a mere option that the practical construction placed upon the agreement by the parties themselves, together with the other circumstances already adverted to, may fairly be considered in ascertaining the intent with which the writing was made.

At a witness in his own behalf, the defendant quite uniformly speaks of his deal with Fobian as a "sale." He further says:

"I admit Mr. Gompert had the farm listed to find a purchaser for me. * * * I told him, if he would find a purchaser, I would pay him \$2.50 an acre. I met Fobian through Mr. Gompert, and took him down to see the farm. * * * The disagreement between Gompert and myself

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contract.

is that I do not think I should pay this, except as I get the money from Fobian. He agreed to take his percentage, and, if I get 100 per cent, he shall have 100 per cent."

Defendant's claim that plaintiff had agreed to accept payment in installments, as Fobian's installments were paid, was denied by the plaintiff. This issue of fact was submitted to the jury, with an instruction that, if such agreement had been made, then plaintiff could not recover. The jury appears to have found the fact against the defendant, and, for the purposes of this appeal, this finding must be taken as final. That defendant regarded and still regards his contract as one of sale, is very evident. Indeed, it is the only attitude he can take which is at all consistent with the admitted facts.

III. Complaint is made that the trial court erred in permitting the jury to pass upon the question whether the contract between defendant and Fobian was intended as a contract of sale, or as an option to Fobian to make the purchase. The position of the appellant is that the construction or meaning of the contract was for the court alone, and not for the finding of a jury.

3. **APPEAL AND ERROR:** submitting construction of contract to jury.

It results from our views, as expressed in the first paragraph of this opinion, that, even if this assignment of error be well taken, and if the construction of the contract was for the court, and not for the jury, the error so committed was without prejudice.

Further discussion is unnecessary. There is no sound theory, upon the proved and admitted facts, on which plaintiff can be denied a recovery. The trial court did not err in refusing to direct a verdict for the defendant, nor does prejudicial error otherwise appear in the record. The judgment of the district court is—*Affirmed*.

LADD, GAYNOR, and STEVENS, JJ., concur.

HARPER & WARD, Appellants, v. CARL J. KURTZ, Appellee.

GAMING: Bucket Shops—Nondelivery of Grain—Pleading. A defendant in an alleged "bucket shop" deal who pleads (*apparently* under Sec. 4967, Code, 1897), that *neither he nor the broker* ever intended any actual delivery of the grain, does not estop himself from invoking the aid of Sec. 4975-d, Code Supp., 1913, which invalidates such contracts *if the broker alone* intended nondelivery.

SALINGER, J., dissents.

GAMING: Bucket Shops—Statutes Compared. Section 4967, Code, 1897, furnishes no remedy against a fraudulent broker who does not intend delivery of the thing sold, *if the buyer did intend such delivery*. Sec. 4975-d, Code Supp., 1913, does furnish such relief.

TRIAL: Exceptions to Instructions—Sufficiency. Exceptions reviewed, and held amply sufficient to present the point argued as grounds for new trial.

TRIAL: Waiver of Exceptions. If the court be wrong in his instructions, and persists in the error by overruling counsel's specific exceptions, counsel may then adapt himself to the erroneous position of the court, and, by requested instructions, seek, so far as possible, to minimize the erroneous position of the court. *By so doing, counsel does not waive his overruled exceptions.*

SALINGER, J., dissents, under the record presented.

GAMING: Bucket Shops—Nondelivery—Evidence. On the issue of nonintended delivery of grain, evidence is admissible that, from time to time during a period of three years, defendant, without payment of the purchase price, had "bought" of plaintiff over 700,000 bushels of grain, and no part of the same had ever been delivered, through warehouse receipts or otherwise.

Appeal from Polk District Court.—W. S. AYRES, Judge.

DECEMBER 13, 1919.

REHEARING DENIED APRIL 13, 1920.

ACTION by plaintiffs, a partnership, to recover advance-

ments alleged to have been made by plaintiffs for the defendant as a customer, in the purchase of grain on the Chicago board of trade. The amount claimed was \$4,100. There was a verdict for the plaintiffs. Upon defendant's motion, a new trial was ordered. From such order the plaintiffs have appealed.—*Affirmed.*

J. G. Myerly, for appellants.

Read & Read, for appellee.

EVANS, J.—I. It is the contention of the plaintiff that only one of the many grounds contained in defendant's motion for a new trial was sustained, and that the others were overruled. Without going into the question, we shall take for granted the correctness of the claim of appellant in this regard, and shall consider the propriety of the court's order as being based upon one ground of the motion only. This ground of the motion charged error in Instruction No. 5, given by the court, in that the court therein failed to take account of Section 4975-d of the Supplement to the Code, 1913. The statutes applicable to the case are Section 4967, Code, 1897, and Section 4975-d, Code Supplement, 1913, which are as follows:

"Sec. 4967. It shall be unlawful for any person, corporation, association or society to keep within the state any store, office or other place for the pretended buying or selling of grain, pork, lard, or any mercantile, mining or agricultural products or corporation stocks, on margins, without any intention of future delivery, whether such pretended contracts are to be performed within or without the state; and no person, corporation, association or society within the state shall make or enter into any contract or pretended contract, such as is above stated and referred to; the intention of this section being to prevent and pro-

1. GAMING: bucket
shops: non-
delivery of
grain: pleading.

hibit within the state the business now engaged in and conducted in places commonly known and designated as bucket shops. But this section shall not apply or in any way affect any contract for the actual buying or selling of any commodity whatever for present or future delivery, where the actual delivery or receipt of the thing sold is contemplated and in good faith intended by either of the parties to the contract."

"Sec. 4975-d. That a bucket shop, within the meaning of this act, is defined to be an office, store or other place wherein the proprietor or keeper thereof, or other person or agent, either in his or its own behalf, or as the agent or correspondent of any other person, corporation, association or co-partnership within or without the state, conducts the business of making or offering to make, contracts, agreements, trades or transactions respecting the purchase or sale, or purchase and sale, of any stocks, grain, provisions, cotton, or other commodity, or personal property wherein both parties thereto, or said proprietor or keeper, contemplate or intend that such contracts, agreements, trades or transactions shall be, or may be closed, adjusted or settled according to, or upon the basis of, the public market quotations of prices made on any board of trade or exchange, upon which the commodities or securities referred to in such contracts, agreements, trades or transactions are dealt in by competitive buying and selling, and without a bona-fide transaction on such board of trade or exchange; or wherein both parties, or such keeper or proprietor shall contemplate or intend that such contracts, agreements, trades or transactions shall be, or may be, deemed closed or terminated when the public market quotations of prices made on such board of trade, or exchange, for the articles or securities named in such contracts, agreements, trades or transactions, shall reach a certain figure; and also any office, store or other place where the

keeper, person or agent, or proprietor thereof, either in his or its own behalf, or as an agent, as aforesaid, therein makes or offers to make, with others, contracts, trades or transactions for the purchase or sale of any such commodity, wherein the parties thereto do not contemplate or intend the actual or bona-fide receipt or delivery of such property, but do contemplate or intend a settlement thereof based upon differences in the price at which said property is, or is claimed to be, bought and sold. The said crime shall be complete against any proprietor, person, agent, or keeper thus offering to make any such contracts, trades or transactions, whether such offer is accepted or not. It is the intention of this act to prevent, punish and prohibit, within this state, the business now engaged in and conducted in places commonly known and designated as 'bucket shops,' and also to include the practice now commonly known as 'bucket shopping' by any person or persons, agent, corporations, associations or copartnerships, who or which ostensibly carry on the business or occupation of commission merchants or brokers in grain, provisions, cotton, coffee, petroleum, stocks, bonds or other commodities whatsoever."

Instruction No. 5, given by the court, contained the following:

"To make such transactions illegal, it is not sufficient to show that one of the parties to such transaction had no intention of delivering the grain sold, and that such party expected and intended only settlement thereof by paying or receiving the difference in prices, but, before such transactions will be held illegal, it must appear that *both* parties to said transaction mutually intended that no such future delivery thereunder would ever be made, and that the transaction was wholly upon margins and differences in prices between the time of buying or selling and the time of delivery. If you shall find from the evidence in this case that, at the time of the transactions, no future delivery

was, in fact, contemplated by the plaintiffs and the defendant in the purchase or sale of grain by plaintiffs for the defendant, but that the said transactions were based wholly upon margins and the settlement of differences between the price of grain at the time of sale and the time of delivery, then the transactions would be contrary to public policy and void; and, in that event, if you so find, the plaintiffs would not be entitled to recover."

It will be noted from the foregoing that the court wholly lost sight of Section 4975-d, which is also known in the record as Chapter 213 of the Acts of the Thirty-third General Assembly. The only error as-

2. GAMING: bucket
shops: statutes
compared.

signed as a ground of reversal is the court's error in sustaining the motion for a new trial on such ground. The other assignments of error are wholly formal and precautionary, and charged error of the court in sustaining Paragraphs 8, 10, 11, and 12 of the motion for a new trial. It is the contention of the appellant in argument, however, as already indicated, that none of the paragraphs in question were sustained by the court. The only assignment of error argued by the appellant is as follows:

"The court erred in sustaining said motion on the ground as stated in his decision and opinion, to wit: The ground based upon the request of defendant to the court that it should instruct the jury upon the law as stated in Chapter 213 of the Laws of the Thirty-third General Assembly; also, the court should have submitted to the jury the questions: (1) As to whether or not the plaintiffs were conducting such business as was prohibited by Chapter 213, Laws of the Thirty-third General Assembly; and (2) whether or not the particular transaction involved in the case was not done in the prosecution of such business."

The broad contention of the appellant is that the case is governed wholly by Section 4967, and that Section 4975-d

has no application thereto. Both of these sections purport to deal with bucket shops. The provisions of both sections are concurrent, in some respects. But the latter statute adds something to the earlier one. Section 4967 provides that it shall not apply in any case where an actual delivery is contemplated by *either* of the parties: that is to say, it furnishes no remedy against a fraudulent broker who did not intend delivery of the thing sold, if his customer was honest in his expectations. In this respect, however, the effect of the statute is wholly negative. It issues no permit to the fraudulent broker, if such he be, to conduct his method of business, even with customers of bona-fide intentions.

Section 4975-d does furnish a remedy against the "proprietor" or "keeper" who does not intend delivery, and this even though the customer, in good faith, expects delivery. There is no necessary inconsistency between the two sections.

It is argued for appellant that Section 4975-d did not repeal Section 4967, and that, therefore, Section 4967 stands. Let it stand. But it is further argued that the last sentence of Section 4967, unless repealed, stands in the way of the application of Section 4975-d to the case. There is nothing to be found in such sentence except a limitation of the application of Section 4967. We think it clear, therefore, that the case does involve a consideration of Section 4975-d, as well as of 4967, and that the trial court properly so held, in his consideration of the motion for a new trial.

II. It is argued that the defendant is precluded by his pleading from invoking the aid of Section 4975-d, in that his pleading was predicated wholly upon Section 4967. It is true that the defendant, in his answer, pleaded that it was not contemplated either by plaintiff or defendant that there should be any actual delivery of the commodity sold. If the evidence on behalf of the defendant satisfied the

jury that the plaintiff, as proprietor or keeper, did not intend actual delivery, would the defendant's pleading preclude him from resting his case upon such evidence? Or if, in addition to such evidence, he introduced evidence also to the effect that *he* had no intention of receiving delivery, would it be fatal to his case if the jury were to find adversely to him as to his own intentions, and yet find with him as to the intentions of the plaintiff, as proprietor or keeper? If the defendant pleaded more than he was required to prove, was he, therefore, bound to prove all that he pleaded? We have always held otherwise. If the defendant had satisfied the jury that neither party had intended actual delivery, then he would have prevailed under both statutes. . If he satisfied the jury that only the plaintiff, as proprietor and keeper, did not intend actual delivery, then Section 4967 ceased to be applicable, and defendant would be entitled to prevail under Section 4975-d. The defendant was not required to plead the statutes nor to reduce his allegations to the measure of the one or the other, even though it be true that it would have been sufficient for him to plead that the plaintiff, as proprietor and keeper, did not intend actual delivery.

III. It is further argued that the defendant did not properly except to Instruction 5. The record shows that he did file written exceptions under the statute. His exception to this instruction includes the fol-

8. TRIAL: excep-
tions to in-
structions: suf-
ficiency.

lowing:

"Defendant further objects to said instruction because and for the fact that the same does not correctly state the law, in that it does not instruct the jury that, if Harper & Ward, the plaintiffs, who were the proprietors or keepers of the brokerage office wherein the transactions involved in this controversy were made, did not intend that delivery should ever be made of the commodity sold or purchased in said

transactions, these transactions were illegal, as provided in Section 4975 of the Supplement to the Code of Iowa, and the other laws of the state of Iowa applicable thereto; and, for the reasons herein stated, defendant excepts to the giving of said instruction."

Furthermore, Instruction No. 7 contained the same vice as Instruction No. 5, in that it emphasized the fact that there must have been an absence of intention to deliver, on the part of both defendant and plaintiff. To this instruction the defendant made the following written exception:

"Defendant further objects to Instruction No. 7, given to the jury, for the reason that the same incorrectly states the law, and is confusing and misleading, and for the further reason that the instruction places upon the defendant the burden of proving that both he and the plaintiffs had no intention of receiving or delivering any grain in the transactions in controversy, such instruction being in law erroneous and incorrect, and tending to place a greater burden on the defendant than the law actually places on them; and for such reasons, defendant excepts to the giving of said instruction."

We see nothing wanting in these exceptions to bring specifically to the attention of the court the very point which was urged in the motion for a new trial, and which was sustained by the trial court.

IV. It is further argued that the defendant waived his exception by his requested instructions. The court having denied his exceptions, and held, in effect, by Instructions 5 and 7, that Section 4967 was controlling, the counsel for defendant requested the following Instructions 3 and 5:

4. TRIAL: waiver
of exceptions.

"3. Defendant in his answer sets up, as a defense, the claim that the transactions concerning which this suit is brought, were what is commonly known as dealing in futures, or options, wherein it was not contemplated

by either party to the transaction that actual delivery of the commodity dealt in was to be made by either party, as the case might be, depending on whether the sale or purchase was involved, and that, on the contrary, all of such transactions were what is commonly known as gambling transactions, because of the fact that no such delivery was contemplated, and that the transactions were to be settled by an offset of the difference between the sale price and the purchase price, as the case might be. You are instructed that, if you shall find from the evidence that the parties to the transaction concerning which this suit has been brought, did not intend nor contemplate that the delivery or deposit of the commodity dealt in was to be made or accepted, and that settlement of such transactions was to be made by offsetting contracts for the sale and purchase of the commodity, as the case might be, and the payment of the difference, then your verdict must be for the defendant, and you will so render it; for the law declares that such transactions are but gambling transactions, and, as such, are illegal and void.

"5. You are instructed that the law declares void all contracts for the purchase or sale of grain or produce where there is no intention to make actual delivery of the grain or produce. You will first determine whether or not, in the case before you, there was actual, bona-fide intention to make actual delivery of the grain or produce, in the instances of the particular sales or purchases out of which the claims sued on by the plaintiff arise.

"If there was no bona-fide, actual intention to make actual delivery of the grain, then the plaintiff cannot recover, and your verdict will be for the defendant; but, if you find there was the actual, bona-fide purpose and intent, at the time, to make actual delivery of the grain or produce, then such transactions were valid."

We think it was the clear right and duty of counsel for

defendant, at this point, to adapt themselves to the view of the law already adopted by the court over their exception, and to soften, as much as they could, the emphasis of the court's Instructions 5 and 7. Surely, we must recognize the right of an attorney to plead with the court for a modification of erroneous views, where a complete correction of them appears impossible of attainment. Requested Instructions 3 and 5 fairly appear to be an attempt to eliminate the emphasis of the instructions given by the court. In the light of the record, they were clearly not intended as a waiver of the exceptions. Furthermore, the appellant, in his brief, specified his grounds relied on for a reversal, and this is not one of them. See *Johnson v. City of Denison*, 186 Iowa 949; *Cram v. City of Des Moines*, 185 Iowa 1292; *Cheney v. Stevens*, 173 Iowa 288; *McDermott v. Ida County*, 186 Iowa 736.

V. It is claimed that there was no evidence to sustain the defense, and that the court should have directed a verdict for the plaintiff. A pivotal fact in the case was that of the intent of the plaintiffs. Such fact

5. GAMING: bucket
shops: non-
delivery: evi-
dence.

could be proved by defendant only by conduct and circumstances. It could be determined by the jury only as a matter of inference.

Without going into detail, it was enough to say that the defendant had been a customer of the plaintiffs' for three years, and, during that time, had bought ostensibly 275,000 bushels of corn, 320,000 bushels of wheat, and 135,000 bushels of oats. All the purchases were made from time to time upon small margins, amounting, however, to a sum total of \$8,000. Not a bushel of these grains was ever delivered, nor was any warehouse receipt ever delivered. The only kind of delivery claimed by the plaintiff is that it had in its possession warehouse receipts, which it would have delivered to the defendant at any time when he was ready to pay the purchase money. In none of these trans-

actions did the defendant ever pay the purchase money. This evidence was proper for the consideration of the jury on the question of the intent of both parties or either. We think that the trial court did not err in granting a new trial. The order is, therefore,—*Affirmed*.

LADD, C. J., WEAVER, GAYNOR, PRESTON, and STEVENS, JJ., concur.

SALINGER, J. (dissenting). The majority opinion indicates some trend to affirm this appeal because of defects in presentation. Considerable stress is laid on what is termed the assignments of error, and some little stress on what is "argued." It was settled in *Jahr v. Steffen*, 187 Iowa 168, that the form of the assignment of error, so called, is of so little importance that review may be had when it is entirely absent. It was settled before that that whatever is the "brief point" controls on review. The brief points do make two complaints clear, or perhaps it is more accurate to say one complaint, and a subordinate proposition under it. The complaint is it was error to grant a new trial on the ground that an instruction was erroneous, when, in truth, it was not erroneous, and that it was also error to grant new trial, even if the instruction were erroneous, because the new trial was granted to one who had induced the alleged erroneous instruction by an offer which the court accepted. In my opinion, these propositions carry farther than their face. The brief point invokes every reason that can legitimately be suggested in support of the proposition asserted. Every legitimate reason for a statement of error cannot be and should not be set out in the assignment. I know of no rule which requires the court to refrain from advancing reasons for dealing with the brief point, and the reasoning power of the court is not circumscribed by merely the reasons that the brief states in terms. The brief point says, in terms, that it was error to grant

the new trial, because the instruction for the giving of which it was granted was not erroneous, and that, in any event, the new trial should not have been granted, because any injury suffered by the movent was self-invited, by offered instruction. In my judgment, if this be found sound, there is no reason why it should not be further advanced as reason for reversing that the error was self-invited, not only by offered instruction, but by the form of the answer interposed, which also invited the giving of said instruction.

The way out attempted is an assertion that the case comes within the rule that one who has met a ruling as to which he has saved his objections is not estopped to complain of that error on appeal because he later offers an instruction seeking to guide the court in applying the law it has announced. The trouble with this position is its premise. It is true that appellee did except to Instruction 5, and therein complains, as he does now, that same was erroneous. The instructions are presumed to be correct. If one is erroneous, and the record shows that, in substance, it is one offered by a party, then, to save the erroneous instruction, it is, on appeal by that party, conclusively presumed that his offer induced the erroneous instruction. It is not *presumed* that the offer was made to guard the court in the application of an erroneous ruling already made against objection. That claim is, in effect, a claim that, because something occurred *before* the instruction was offered, such offer is not the acquiescence in the charge given which, on its face, it appears to be. He who urges such avoidance must prove its predicate: that the exceptions were overruled, and overruled *before* he offered the instruction. If the instruction was offered before the erroneous ruling was made, it cannot be defended because of a ruling which did not exist at the time of the offer. In such case, the offer is not an attempt to limit the effect of an error already committed, but a conclusive admission by the of-

ferant that any instruction given in harmony with the offer is a correct instruction. In one word, to bring the matter within the rule invoked by the majority, there must be some evidence in the record that the offer came after the exceptions. There is no such proof. The abstract shows nothing more than that the instruction was offered, and that certain exceptions were taken. It does not even indicate at what stage of the trial these things were done, and which of them was done before the other. Not only is this so; everything indicates that the instruction was offered before the exceptions were taken. The statute provides that either party may request instructions; that all requests therefor must be presented before the argument to the jury is commenced; and that all objections or exceptions must be made or taken before the instructions are read to the jury. It is matter of common knowledge in the profession that, ordinarily, there is no opportunity to except to instructions before the arguments to the jury begin. The cases are exceedingly rare where the charge would be ready for the examination of counsel before either addressed the jury. The instructions naturally wait until all the evidence is in, and the arguments ordinarily begin at once after the evidence is in. Some light is thrown on this situation by the fact that, since this case was tried, the legislature has extended the time for taking exceptions to the charge to five days after verdict. I cannot see how the alternative rule has any room for application on this appeal.

II. My position is that, where an instruction given is the equivalent of one offered by a party, he is estopped to claim a new trial because such instruction was given. The estoppel urged is upon the party who seeks to subject his adversary to the vicissitudes and expense of a second trial, because of something which he has done, and for which the adversary is in no way chargeable. One who has created the necessity for applying for a new trial, because

he succeeded in inducing the court to give an erroneous instruction, should not be permitted to take away the verdict of his opponent. To grant a new trial in such conditions is to allow a party to use his wrong or negligence for his own benefit. The active inducing of the court to commit an error is surely of as much effect against him who thus acts as would be his omission to act,—negligence; and time and again has the granting of new trial been reversed because the one who obtained it might not have needed it, had he not been negligent. This has been held under a statute identical with our own. *Clifford v. Denver, S. P. & P. R. Co.*, 12 Colo. 125 (20 Pac. 333). That, in effect, is the holding of *Town of Manson v. Ware*, 63 Iowa 345, 349; *Collins v. City of Keokuk*, 147 Iowa 605; *Shepherd v. Brenton*, 15 Iowa 84; *Riley v. Monohan*, 26 Iowa 507; *Stewart v. Ewbank*, 3 Iowa 191; *Mehan v. Chicago, R. I. & P. R. Co.*, 55 Iowa 305; *Richards v. Nuckolls*, 19 Iowa 555; and *Keys v. Francis*, 28 Iowa 321.

III. There is no change in statute law which makes the instruction erroneous. The older statute prohibits certain things, and has a proviso that it shall not apply to these things if *either* party intended, in good faith, to make actual sale and delivery. The change in statute merely prohibits some things *not* prohibited in the original statute, and fails to apply the proviso of the older statute *to the things forbidden by the new one*. The exact effect is that the matters in the old statute are controlled by the proviso, while those in the new statute are not. The instruction given was not erroneous because it gave the benefit of the proviso to facts within it, and doing this cannot possibly be made erroneous because there are other prohibited acts to which the proviso does not apply. It seems to me that is the reason on which *Lamson v. Mensen* is affirmed.

IV. The majority seems to grant that the original section still stands, and takes the position that that makes no

difference. Does it not make a vital difference on whether the defendant is estopped by his answer from obtaining a new trial because of this instruction? If the original statute stands, is not that fatal to defendant, because his answer was framed under that statute, and the instructions merely followed such answer? Under the original section, it was a good defense if *both* parties had no intent to make actual delivery. Grant that, under the new statute, it is a good defense, as to some things, if *either* party lacked such intent. It remains a good defense under both statutes that both lacked such intent. The defendant was at perfect liberty to frame his defense upon the older statute. If the new statute gave him an easier defense, still he had the right to forego that, and to defend with what is a defense under the older statute. He took that course. He was evidently of opinion that the matters involved in the suit were not covered by the new statute; that he must face the proviso in the older statute, and, therefore, make it his affirmative defense that *both* parties had no intention to make an actual sale. He necessarily assumed the burden of proving this. The instruction for which the new trial was granted did nothing more than to tell the jury that defendant had the burden of proving the plea he had presented. This, therefore, is not, as the majority seems to think, a case for invoking the rule that, though one plead more than he need, he may recover though he prove less than that, if such proof makes a case under the law. This is not a case of surplusage in pleading. It is, at worst, a case of underpleading—a failure to claim as much as might be claimed. It is simply a case of a party limiting his own lawsuit, as he had a right to do, and a recognition of that limitation in the charge of the court.

I would reverse.

MRS. FRED HOBSON, Plaintiff, v. DISTRICT COURT OF LINN COUNTY et al., Defendants.

GRAND JURY: Refusal to Answer Nonmaterial Question. A witness may not be lawfully committed to jail for refusal to answer questions before a grand jury, when the materiality and relevancy of such questions to an indictable offense then under investigation do not appear, either (1) from the face of the questions or (2) from an independent showing of facts.

Certiorari to Linn District Court.—JOHN T. MOFFIT,
Judge.

APRIL 13, 1920.

PROCEEDINGS for certiorari to test the authority of the court to order the imprisonment of a witness who refused to give testimony before the grand jury, upon the ground that the evidence sought was immaterial, and not germane to any matter at the time the subject of proper inquiry by that body.—*Order annulled.*

F. L. Anderson and Voris & Haas, for plaintiff.

H. K. Lockwood, for defendant.

STEVENS, J.—After being duly sworn by the foreman, as a witness before the grand jury of Linn County, plaintiff declined to answer the following questions:

“(1) In what business is your son Leo Hobson now engaged? (2) State to the grand jury where your son Leo is at the present time, and anything you know of his present whereabouts.”

She was brought into open court by the grand jury, and, in the presence of all the members thereof, and at the request of its foreman, the county attorney informed the court that the witness refused to answer the above questions, and that, in the opinion of the grand jury, both interrogatories

were important, pertinent, and material to certain matters then under investigation before that body. Nothing was disclosed by the county attorney or grand jury as to the subject or nature of the investigation referred to, and no inquiry was made by the court in relation thereto.

Counsel appeared for plaintiff, and objected to the questions on various grounds, among which were that the evidence sought was immaterial, not pertinent to any matter pending before the grand jury, and did not tend in any way to prove the commission of a criminal offense by Leo Hobson or any other person, or that evidence as to his whereabouts would tend in any way to aid the jury in its investigation of offenses committed within the county of its jurisdiction. The objections were overruled, and the witness directed to answer. Persisting in her refusal to do so, she was by the court ordered committed to the county jail, until such time as she signified a willingness to comply with the order of the court.

The grand jury is an appendage or constituent part of the court, exercising certain limited powers and duties under its instructions and direction, but also exercising certain other powers and duties independent and beyond the control of the court. It is its duty to diligently inquire, and true presentment make, of all offenses committed or triable within the county of its jurisdiction of which it has or can obtain legal evidence. Its proceedings are conducted secretly, and with the assistance of the county attorney, and it may request and receive advice from the court. It has no power to compel the attendance of witnesses, or to punish them for refusing to answer questions propounded to them. Subpoenas are issued from the office of the clerk, and the attendance of witnesses before it may be enforced by the court in the same way as witnesses served with a subpoena to testify in any matter pending before it. The power to

punish a witness for refusing to testify before a grand jury is, by Section 4461 of the Code, conferred upon the court. The proceedings in case of the refusal of a witness to testify before that body, and the nature of the hearing before the court, are set forth in Section 5270 of the Code, as follows:

"When a witness under examination before the grand jury refuses to testify or to answer a question put to him, it shall proceed with the witness into open court, and the foreman shall then distinctly state to the court the question and the refusal of the witness, and if upon hearing the witness the court shall decide that he is bound to testify or answer the question propounded, he shall inquire of the witness if he persists in his refusal, and, if he does, shall proceed with him as in cases of similar refusal in open court."

It will be observed from the provisions of the foregoing section that, after the witness has been brought into court, the foreman shall then distinctly state the question or questions propounded to the witness, and inform the court of his refusal to answer the same; then, "if upon hearing the witness, the court shall decide that he is bound to testify or answer the question propounded, he shall inquire of the witness if he persists in his refusal, and, if he does, shall proceed with him as in cases of similar refusal in open court." Technically, the contempt of which the witness is guilty is the violation of the authority and dignity of the court, but committed in the presence of the grand jury. The grand jury is the instrumentality by which evidence of the violation of criminal statutes is obtained, and presentment made to the court, and, no doubt, wide latitude must be allowed it in the exercise of its inquisitorial powers, and, its efficiency should not be curbed or circumscribed by technical rules of evidence, with which members thereof ordinarily have little or no familiarity. Nevertheless, indictments should be founded on legal evidence. *State v. Tucker*,

20 Iowa 508; *State v. DeGroate*, 122 Iowa 661. The informalities observed in the rules of evidence by grand juries, and the wide latitude allowed them in the exercise of their inquisitorial powers, should never be permitted to become the instrument of oppression, or be used for any other purpose than that of obtaining information as to indictable offenses triable within the county in which the grand jury is sitting, or for other lawful purposes, nor should the witness be his own judge as to whether he will answer or not; but the power of the court is ample to prevent abuse of the prerogatives of either grand jury or witness, and to enforce all necessary rules for the proper and efficient performance of the duties of the grand jury. It would, to say the least, be a grave injustice to commit a witness for contempt of court for refusing to answer questions having no materiality or relationship to any matter pending before it, or forming the subject of its investigation. Such evidence is not legal evidence, within the meaning of the law. The right of the grand jury to disregard technical rules of evidence in the examination of witnesses is of no controlling importance in a proceeding before court to compel a witness to answer questions propounded to him. Evidence which does not tend to reveal the commission of some indictable offense, or to identify the offender, or to lead to the discovery of other material and competent evidence, would not be material. The same technical rules of evidence, so far as practicable, that obtain in the trial of causes before the court or a jury, should be applied in a proceeding for contempt, and it makes no difference that the offense consists of the refusal to answer questions propounded by or before the grand jury. The materiality of the evidence sought, no doubt, may often be apparent from the form and substance of the question asked; but, unless this is true, the court should inquire sufficiently into the proceedings of the grand jury to determine whether the witness has declined to testify to

material matters. *Rogers v. Superior Court*, 145 Cal. 88 (78 Pac. 344); *In re Archer*, 134 Mich. 408 (96 N. W. 442).

It is true that, by specific statutory enactment, the proceedings of the grand jury are conducted in secrecy. The reasons therefor are apparent from the nature of the duties performed thereby. It would often defeat the very purpose of the inquiry if public revelation were made of the particular offense being investigated; but sufficient information may be imparted to the court, and made of record in proceedings of this character, to enable it to determine the materiality and legality of the evidence sought, without violating either the statute or public policy upon which it is based. Proceedings of this character are held in this state to be in their nature criminal, or quasi criminal, and a clear case of contempt must be shown by the evidence where it is required. *Russell v. Anderson*, 141 Iowa 533; *Carr v. District Court of Van Buren County*, 147 Iowa 663; *Wells v. District Court of Polk County*, 126 Iowa 340; *Tuttle v. Hutchison*, 173 Iowa 503. The refusal of the witness upon which the prosecution is based, was to answer questions in the presence of the grand jury, and not of the court; and while, as stated, the offense is technically against the authority of the court, it was not committed in the actual presence thereof.

The questions propounded to the plaintiff may have been intended to elicit evidence important and material to some matter properly under investigation by the grand jury, but such materiality clearly does not necessarily appear upon the face thereof. If, for example, the answer of the witness to the first question had been that Leo Hobson was engaged in the drygoods business at Tipton, Iowa, or if, in answer to the second question, she had stated that Leo Hobson was residing in Kalamazoo, it is hardly conceivable that such evidence would have been material. Before ordering the witness committed to jail for contempt, the court should have required the grand jury to make sufficient show-

ing to enable it to say that the questions were proper, and that they sought to elicit material and important information. *Rogers v. Superior Court*, supra; *In re Archer*, supra.

The jurisdiction of the grand jury before which plaintiff was summoned was limited to Linn County, and, while it is conceivable that the examination might have resulted in eliciting information tending to show that Leo Hobson was engaged in an unlawful business in Linn County, or that his whereabouts might bear such relation to other facts or circumstances as to have an important bearing upon the question of his own guilt or that of some other offender punishable in Linn County, the record before us does not so show.

The evidence in a proceeding to punish a recalcitrant witness for contempt must show affirmatively that he had refused to give legal evidence in a trial before the court, or before some other court or tribunal having a right to demand the same.

Section 4466, Code of 1897, requires that, where the action of the court is founded upon evidence given by others, it must be reduced to writing, filed, and preserved, and, if the court acts upon personal knowledge, a statement of the facts upon which the order is founded must be entered on the record of the court, or be filed and preserved, when the court keeps no record. The court could not determine the materiality of the evidence sought, without a showing of the facts, which should have been made of record.

It is the conclusion of the court that the record before us does not sustain the order of the court below, directing that plaintiff be committed to the county jail until such time as she expressed a willingness to answer the above questions, and it is, therefore,—*Annulled*.

WEAVER, C. J., LADD and GAYNOR, JJ., concur.

ETHEL HUNT, Appellee, v. DES MOINES CITY RAILWAY COMPANY, Appellant.

NEW TRIAL: Movant Responsible for Conflicting Instructions.

- 1 New trial may be granted because of conflicting and irreconcilable instructions, even though the movant for new trial did, *in part*, invite the conflict by his requested instructions.

NEW TRIAL: Power of Court to Grant without Motion. A court

- 2 may grant a new trial on its own motion, whenever satisfied that it has prejudicially misdirected the jury. So held where, in an action by a passenger against a carrier for personal injury, the instructions (1) required defendant to show plaintiff's contributory negligence, (2) required plaintiff to show freedom from contributory negligence, (3) treated contributory negligence as a defense, and (4) failed to direct that contributory negligence was only pleadable in mitigation of damages.

Appeal from Des Moines Municipal Court.—T. L. SELLERS, Judge.

APRIL 13, 1920.

ACTION at law to recover damages for alleged personal injury. Trial to a jury, and verdict for defendant. On motion of plaintiff, the verdict was set aside, and new trial granted. Defendant appeals.—*Affirmed*.

W. H. McHenry and A. B. Howland, for appellant.

F. L. Groesbeck, for appellee.

WEAVER, C. J.—The plaintiff alleges that, while a passenger on one of the defendant's street cars, and in attempting to alight therefrom, she fell, or was thrown to the ground, and was injured, by reason of the negligence of defendant's servant in failing to lower to its place the folding step provided for use of passengers in entering and leaving such vehicle. The defendant took

1. **NEW TRIAL:**
movant responsible for conflicting instructions.

issue upon plaintiff's petition, and the cause was submitted to the jury upon the testimony of witnesses and instructions given by the court, and, as already stated, there was a verdict for the defendant. The motion for new trial assigned as grounds therefor: (1) That the finding of the jury was not sustained by the evidence; (2) that the verdict was contrary to the instructions given by the court; (3) that the court erred in giving the jury each of the several instructions numbered 3½, 4, 5, 8, and 10. In the ruling on the motion, and ordering a new trial, the court explained that its ruling was based solely on the exceptions taken to the instructions upon the subject of contributory negligence.

The abstract contains no part of the evidence offered in the case, but is confined to a statement of the issues; the requests for instructions to the jury made by the defendant and by plaintiff and refused by the court; the charge given by the court to the jury; the verdict; motion for new trial; resistance thereto; and the ruling from which the appeal is taken.

Referring first to the defendant's request for instructions, it may be said, without quoting them at large, that, in so far as they related to the question of contributory negligence, they stated the rule to be that, if plaintiff, by her own want of care, contributed to the injury of which she complains, the verdict should be for the defendant.

The plaintiff's request for instructions contained a statement to the effect that, if she fell and was injured by reason of the negligence of the defendant in failing to lower the step, "and she was not guilty of any negligence on her part contributing to said injury, then your verdict should be for the plaintiff; otherwise, for the defendant."

Each of the several requests by the parties was refused by the court, which proceeded to charge the jury of its own motion. That part of the charge having relation to the

question of negligence and contributory negligence, as affecting plaintiff's right to recover damages, is as follows:

"Instruction No. 2.

"The burden of proof in this case is on the plaintiff, and, before she can recover from the defendant, she must establish by a preponderance of the evidence the following propositions:

"First. That the defendant herein, through its employees, was guilty of negligence substantially as charged in plaintiff's petition.

"Second. That such negligence was the proximate cause of the injury to plaintiff.

"Third. That the plaintiff has sustained damages by reason of injury to her person, which was the proximate result of defendant's negligence.

"Unless the plaintiff has sustained each and all of the foregoing propositions, 1 to 3 inclusive, by a preponderance of the evidence, you will proceed no further, but your verdict will be for the defendant; but if you find that plaintiff has established, by a preponderance of the evidence, each and all of the foregoing propositions numbered 1 to 3 inclusive, you will then proceed to consider the amount of damage suffered by plaintiff."

"Instruction No. 3½.

"You have been instructed that the *plaintiff in this case cannot recover if she was guilty of contributory negligence which contributed in any degree to the injury of which she complains*, but, upon this question of contributory negligence, you are instructed that *the burden of proof in this case to show contributory negligence on the part of the plaintiff rests upon the defendant, and not upon the plaintiff.*"

"Instruction No. 4.

"It was the duty of the plaintiff to exercise ordinary

care for her own safety in alighting from said car, and to do what a reasonably prudent person would have done for her own protection at said time; and if you find, from all of the evidence and the surrounding circumstances, that a reasonably prudent person would have taken hold of the handholds or upright rods of said car in alighting, and if you further find that plaintiff failed to do so, *and that said failure so to do contributed to and was the proximate cause of her injury, then you should return a verdict for defendant.*"

"Instruction No. 5.

"If you do not find, by a preponderance of the evidence, that plaintiff was free from any negligence which in any manner contributed to her injury, then you need inquire no further, and your verdict should be for defendant."

"Instruction No. 8.

"If you find, by a preponderance of the evidence, that defendant opened the door of the car for the purpose of letting plaintiff go from the car or door, and the step at said door was not let down in its proper place until after plaintiff stepped out of the door, and, as a result thereof, plaintiff was injured, *without any negligence on her part contributing thereto*, your verdict should be for the plaintiff."

"Instruction No. 10.

"If you find, by a preponderance of the evidence, that defendant was guilty of negligence, as herein defined, and that such negligence was the proximate cause of plaintiff's injury, *and you further find, by a preponderance of the evidence, that plaintiff was not guilty of any negligence which in any manner contributed to or was the proximate cause of said injury*, then your verdict should be for the plaintiff, and you should proceed to determine the amount of damages she is entitled to recover of defendant, which in no

event shall exceed the amount claimed by plaintiff, to wit, \$1,000."

That these instructions were erroneous is conceded in argument to this court, but a reversal therefor is resisted on the theory that plaintiff, by her requests to the court, invited the error so committed, and cannot be heard to complain of the prejudice, if any, resulting from such misdirection. That a party cannot successfully assign error upon the giving of an instruction which he has himself requested is a rule very frequently applied, and is, in itself, both fair and just. Does the case before us come fairly within the scope of that rule?

Before entering upon a consideration of the question so presented, it is well to note the present state of the law respecting the effect of a plaintiff's contributory negligence in actions of this character. The general rule that a plaintiff, in an action to recover damages for personal injury sustained by reason of the alleged negligence of another, must assume the burden of negating contributory negligence on his own part, and, failing so to do, is not entitled to recover, was so long the undisputed law of this state, and so firmly fixed in the mind of law students and practitioners, that the recent statutory innovation thereon has not had attention or recognition in proportion to its importance. This rule was first modified by Code Supplement, 1913, Section 2071, in favor of railway employees; but later, the exception thereto was so enlarged by an act of the thirty-sixth general assembly (Supplemental Supplement to the Code, 1915, Section 3593-a) as to place the burden of proving contributory negligence upon the defendant, in all actions for personal injury brought by an employee against his employer, or by a passenger against a common carrier; but, in such cases, the defendant may plead and prove contributory negligence, in mitigation of damages.

In explanation of the confusion which is apparent in

the quoted instructions, it is said by counsel for appellant, and not denied, that, on the trial below, plaintiff's counsel and the court had apparently ignored the statute referred to, and proceeded on the theory that the ancient rule was still in force, until about the time of the submission of the issues to the jury, when counsel himself called attention to the mistake. The record as presented here would seem to indicate, upon its face, that, when this situation became apparent, the trial court had already prepared its charge on the wrong theory, and sought to remedy or avoid the effect of the error by amending and changing the language of certain paragraphs therein. That this attempt resulted in a very confused statement of inconsistent rules and irreconcilable propositions of law is doubtless due to the haste with which the change of front was made.

The case thus presented by the record does not bring it within the rule applicable to an alleged error which has been invited by a defeated party. Plaintiff did ask an instruction which recognized the ancient rule of the law of contributory negligence, and, if the giving of this rule were the only error in the charge to the jury, it would not justify the award of a new trial. But this is not the only error. If the court saw fit to adopt the plaintiff's erroneous theory of the law of contributory negligence, and if plaintiff's mouth is closed to complain thereof, he was, at least, entitled to have the rest of the charge of the court consistent therewith. On the other hand, it is impossible to reconcile the charge as a whole upon this subject with either theory of the law.

The second instruction states a rule by which plaintiff may recover damages, on proof of defendant's negligence, resulting in injury to her, without any reference whatever to the question of contributory negligence. Instruction No. 3½ tells the jury that plaintiff can recover nothing, if she was guilty of contributory negligence in any degree; but

that the burden of proving such contributory negligence is on the *defendant*. Instruction No. 5 places upon *plaintiff* the burden of showing that she was "free from any negligence which in any manner contributed to her injury," before she can recover damages, and this thought is repeated in Instruction No. 10. Nowhere in the charge is there any instruction that contributory negligence is available to defendant only as a plea in mitigation of damages, and not as a defense. The jury was thus left afloat upon a sea of uncertainty, without chart or pilot, and with a compass veering erratically from one course to another. If the court, upon reflection, or re-examination of the record so made, became convinced that its error could be best mended by ordering a new trial, it was a reasonable conclusion, and wholly within the scope of its judicial discretion. Indeed,

2. **NEW TRIAL:**
power of court
to grant without
motion.

on behalf of either party to the suit, the court, if convinced that it had misdirected the jury, and that prejudice to either party resulted, or might have resulted therefrom, could properly order a new trial upon its own motion; and the case presented by this record is very clearly one which would justify the exercise of that discretion. *Allen v. Wheeler*, 54 Iowa 628, 630; *Thomas v. Illinois Cent. R. Co.*, 169 Iowa 337, 341.

Speaking on this subject, the Nebraska court, where the statute on new trials is substantially like our own, has well said:

"The rule thus recognized has not only the sanction of authority, but rests upon the soundest and most satisfactory reasons. The power is inherent in all courts of general jurisdiction to correct errors committed by them which are clearly prejudicial to the parties, and their power in that respect is exercised, not alone on account of their solicitude for the rights of the litigants, but also in justice to

themselves, as instruments provided for the impartial administration of the law." *Weber v. Kirkendall*, 44 Neb. 766 (63 N. W. 35).

See, also, *Merchants & F. Bank v. McKellar*, 44 La. 940; *Bond v. Cutler*, 7 Mass. 205; *Schmidt v. Brown*, 80 Hun (N. Y.) 183; *Fort Wayne & B. I. R. Co. v. Wayne Cir. Judge*, 110 Mich. 173.

It is also a very familiar rule, observed by this court, that, except upon clear showing of an abuse of discretion by the trial court in granting a new trial, its order will not be interfered with upon appeal; and, in view of our conclusion, already indicated, that, irrespective of the error invited or suggested by the plaintiff's request for instruction, the record discloses ample justification for granting a new trial on the court's own motion, the order appealed from will be permitted to stand.—*Affirmed*.

LADD, GAYNOR, PRESTON, and STEVENS, JJ., concur.

SALINGER, J. (dissenting). I think that, despite all that was done, this remains a case wherein a new trial was granted for the giving of an erroneous instruction which the movent had asked the court to give. When that is so, it is error to grant him a new trial. My reasons for so saying, and for opposing the sustaining of motions for new trial on general principles, are fully stated in my dissent, filed in the recent case of *Harper & Ward v. Kurtz*, 188 Iowa 1047.

FRANK KONECNY, Appellant, v. W. P. HOHENSCHUH,
Appellee.

DEAD BODIES: Undertaker Permitting Wrongful Autopsy—Joint Liability. If an undertaker knowingly permits a wrongful autopsy to be held in his undertaking establishment, he participates in the wrong, and is jointly liable therefor.

TORTS: Persons Liable—Lawful Act—Unintended Effect. The doing of an act which is, in itself, perfectly lawful will not render one liable as for a tort, simply because the unintended effect of such act is to assist or enable another person to do such wrong.

DEAD BODIES: Undertaker Permitting Wrongful Autopsy—Reliance upon Hospital Physicians. An undertaker, receiving a dead body from a hospital and allowing an autopsy in his establishment by the hospital physicians, who had not secured consent therefor from the decedent's relatives, had the right to assume that said medical staff would not perform an unauthorized autopsy, and he was charged with no duty to ascertain whether proper consent had been obtained for the autopsy.

Appeal from Johnson District Court.—R. P. HOWELL,
Judge.

SEPTEMBER 22, 1919.

REHEARING DENIED APRIL 13, 1920.

ACTION at law to recover damages upon a claim which is sufficiently stated in the opinion. There was a trial to a jury. At the close of the testimony, the court directed a verdict for the defendant, and plaintiff appeals.—*Affirmed.*

F. F. Messer and W. J. Baldwin, for appellant.

Dutcher, Davis & Hambrecht and Otto & Otto, for appellee.

WEAVER, J.—The plaintiff is a resident of Johnson County, Iowa, and the defendant is engaged in business, as an undertaker and embalmer, at Iowa City, in that county. The petition alleges that, on December 5, 1912, the mother of plaintiff died in said county, under circumstances which left plaintiff entitled to the custody and control of his said parent's body, and to control its care and preparation for burial; that, after her death, and without plaintiff's knowledge or consent, that body of the deceased was removed to the undertaking parlors of the defendant, who assumed to

receive it and the duty of caring for and preserving it for the plaintiff, but, instead of so doing, defendant, without right or authority, permitted said body to be dissected, mutilated, and parts thereof to be removed, all of which acts were done wrongfully and maliciously, and in reckless disregard of the plaintiff's right to receive the body in the condition in which it was when life departed therefrom.

Because of this trespass upon his rights, by the abuse and mutilation of his mother's body, by or with the consent of the defendant, plaintiff alleges that he has been made to suffer great mental injury and pain, and he demands recovery of damages. The alleged cause of action is pleaded in various counts, but what we have here stated sufficiently reveals the general nature of the plaintiff's claim.

Answering the petition, the defendant denies the same, and further says that the dead body was delivered to him by the State University Hospital of Iowa, with directions to embalm it, and with the information that said hospital, by its authorized agents, or surgeons, would make a post mortem examination thereof. He further says that he had no knowledge of the identity of the deceased person, was not present at the autopsy, and had nothing whatever to do with it; that the deceased was, in part, a county patient, and admitted to the hospital as such; and that the hospital staff had the right to make the examination. Further answering, he says, upon information and belief, that plaintiff consented to the examination; that the same was conducted in a decent and proper manner by the medical staff of the University Hospital, in the exercise of their regular and proper duties and functions as such.

The answer, as above recited, was not attacked by motion or demurrer; but, plaintiff having joined issue thereon by reply, the parties proceeded to trial to a jury.

The facts, as they appear in the record without substantial dispute, are as follows: The deceased, Mary Konecny,

had, for some years, been a resident of Johnson County. She was a widow, with six children, all, except a married daughter, living together as a single family. The plaintiff, Frank Konecny, and his brother, Louis, were of age, but the remainder of the children were minors.

In October of 1912, the mother became ill, and entered the hospital of the Iowa State University for treatment, and continued there until her death, on December 5, 1912. At this time, and for a considerable period prior thereto, the defendant was an undertaker, doing business in Iowa City. He was also a licensed embalmer. For the transaction of his business, he maintained a building in the city, suitably fitted and arranged for that purpose. There were also other establishments in the city, in which other persons carried on a similar business.

It was the practice and custom of the hospital and its medical staff to hold autopsies upon the bodies of patients dying there, whenever the consent of the family or friends of the deceased could be obtained for that purpose. Such examinations were, in fact, held in perhaps three fourths of the cases of deaths occurring there. The hospital did not have suitable rooms or conveniences for such work, and its custom was, when a death occurred, and an autopsy was to take place, to send the body to one of the several undertaking establishments in the city to be embalmed, after which the medical staff of the University, or some one or more members thereof, would make the examination. On the day of the death of Mrs. Konecny, and within a short time after it occurred, the officer in charge at the hospital called up the defendant, informing him that a death had taken place there, and a post mortem examination was to be held, and inquired how soon he could take the body, and have it ready for the autopsy. He responded, in substance, that it could be done in the course of an hour. Thereupon, he sent his assistant, Sample, to attend to the matter. Following

instructions, Sample went to the hospital, received the body, took it to a room used for that purpose in defendant's building, and there embalmed it. Later, two or more members of the hospital medical staff went to the room where the body had been embalmed, and began their examination. In performing this work, they, or some of them, opened the body, and removed therefrom and examined some of the viscera. Neither the defendant nor Sample participated in or was present at this operation or examination. Before the examination was completed, the plaintiff, accompanied by one Murphy, another undertaker, appeared at defendant's place of business, and inquired if his mother's body was there, and, on learning the fact, asked for its delivery to him. There is dispute as to much of the conversation which ensued, but it seems to be conceded that defendant said, in substance, that a post mortem examination of the body was being held, and it would take some time to prepare it for such delivery; but, plaintiff, or Murphy, being insistent, defendant went to the door of the embalming room, and called out one of the physicians, with whom a short discussion was had. The body was then transferred to a receptacle brought by Murphy, and taken away by him.

Appellee's counsel concede that, if the post mortem examination of this body was made by the physicians without plaintiff's consent, the act constitutes a legal wrong, for which the law affords a remedy. It is also conceded that the fact whether such consent was given is in dispute, and that, if the question be a vital one in this case, the issue should have been submitted to the jury. They contend, however,—and that is the question with which we have to deal,—that, even assuming that no consent is proved, the record still makes no case against the defendant; and with that view we are disposed to agree.

There is no evidence fairly tending to show that defendant was present at or assisted in or took any part in

the autopsy. The most that can be said in this respect is that it took place in his building, and that

1. DEAD BODIES :
undertaker per-
mitting wrong-
ful autopsy :
joint liability.

he knew such examination was contemplated by the physicians, and that it was being performed on his premises. If such examination was wrongful, and he, with knowl-

edge of the wrong, furnished the perpetrators a room or place or conveniences for its performance, such aid and assistance might well be held sufficient to charge him with participation in the wrong, and therefore with joint liability.

But the doing of an act which is, in it-

2. TORTS : persons
liable : lawful
act : unintended
effect.

self, perfectly lawful will not render one liable as for a tort, simply because the un-

intended effect of such act is to enable or assist another person to do or accomplish a wrong. The defendant had an unquestionable legal right to maintain a building or place in which to do business as an embalmer or

undertaker. He had just as clear a right to permit the hospital and its physicians to use

3. DEAD BODIES :
undertaker
permitting
wrongful au-
topsy : reliance
upon hospital
physicians.

a room in his building as a place for holding post mortem examinations. He could reasonably and properly assume that the

hospital authorities and its medical staff

would not abuse such privilege by using it for an unauthorized autopsy. He was charged with no duty to supervise such use, or to ascertain at his peril in each instance whether proper consent had been obtained for the examination of a body brought or sent to his place by the hospital itself.

The record is barren of any testimony tending to show guilty knowledge or unlawful purpose or intent on part of defendant, and, in our judgment, it must be said there is a failure of proof of any act or omission on his part rendering him justly chargeable with damages for the wrong, if any, committed by the physicians. His only connection with the transaction was to receive and embalm the body, a very

proper service, which is not the ground of complaint in this action.

He received the body from the hospital; and, until someone appeared, disclosing a better claim of right or authority to control its care and disposition, he cannot be charged with wrong in recognizing the authority of the hospital to give directions for its care and keeping.

There was no evidence upon which the plaintiff was entitled to go to the jury, and the court did not err in directing a verdict for defendant. The conclusion thus reached renders quite immaterial other assignments of error, and we pass them without further discussion.

The judgment below is, therefore,—*Affirmed*.

LARD, C. J., GAYNOR and STEVENS, JJ., concur.

J. S. McKEMEY, Executor, Appellee, v. ANNA ECKLES
KETCHUM, Appellant.

DEEDS: *Delivery—Retention by Grantor—Effect.* Delivery will be presumed from the execution and acknowledgment of a deed, together with testimony tending to show intention to pass title, *even though grantor retains full possession of the deed until his death.*

PRINCIPLE APPLIED: When the will of grantor was being prepared, the scrivener inquired of testator, "What about the property on the south side of the square?" Testator answered, "Why, I have already deeded that to Anna Eckles." Testator had a box in a bank. After his death, a deed to Anna Eckles for said property was found in the box. The deed was enclosed in an envelope, marked "Anna Eckles' deed to the south side." In this deed, grantor reserved a life estate to himself. This deed was then handed to Anna Eckles, and recorded. *Held* to show delivery by grantor.

Appeal from Jefferson District Court.—D. M. ANDERSON,
Judge.

DECEMBER 19, 1919.

REHEARING DENIED APRIL 13, 1920.

J. W. GILCHRIST died on February 6, 1915. There was a paper, purporting to be a deed, of date August 1, 1908, in which he reserved a life estate, and made Anna Eckles Ketchum grantee. The trial court holds this deed was not delivered, and therefore canceled it. The grantee appeals.—*Reversed.*

Richard C. Leggett, for appellant.

Starr & Jordan and *E. F. Simmons*, for appellee.

SALINGER, J.—If this deed was not delivered, it must be because there was no manual tradition of the paper. The deed in question bears date August 1, 1908. It names appellant as grantee. It reserves a life estate in the grantor, and was duly acknowledged. When the will of grantor was being prepared, the scrivener inquired of him, "What about the property on the south side of the square,—what are you going to do about that?" Testator answered, "Why, I have already deeded that to Anna Eckles." He had a box in a bank. After his death, the box was opened; the executor, appellee, found said deed therein. It was enclosed in an envelope, on which was endorsed, "Anna Eckles' deed to the south side." The executor handed this deed to Mrs. Ketchum, the grantee in the deed. She looked at it, and inquired whether it should be recorded. Being answered in the affirmative, she returned it to the executor, with instructions to have it recorded. He caused this to be done.

Manual tradition of the deed is not essential. It has never been claimed that a physical delivery of land is necessary. The deed is but a symbol of the transfer of the land. Therefore, it is settled that manual tradition of the deed is not essential. True, such tradition is evidence of

intent to part with title. But it is not the sole evidence. The vital point is whether there is such intent, and it may be found to exist, though some particular means of showing intent is absent. If that were not so, an oral sale of land would always be void; for there would be no deed to hand over. In *Shelton's* case, 1 Croke's Rep. 7 (24-38 Eliz.), the party sealed the deed, had it read, but did not deliver it, nor did the grantee take it; it was merely left behind them in the same place. It was held to be a good grant, on the statement that the parties came there for that purpose, "and performed all that was requisite for the perfecting it, except an actual delivery; but, it being left behind them, and not countermanded, it shall be said a delivery in law."

II. Since, then, manual tradition is, contrary to the rule in the delivery of chattels, not indispensable, it is no argument against the deed that there was a failure to make physical delivery of the paper, though it was in the power of the grantor to surrender the same. The authorities are overwhelmingly opposed to the argument that the keeping of physical control of the paper by the grantor is conclusive against delivery. It has been ruled many times that an effective delivery of a deed is not negated because it remained in the physical power of grantor to retake the deed, or because he retained mental power to alter his intentions. In *Ray v. Hallenbeck*, 42 Fed. 381, after finding there was an original purpose to execute the deed, and that the paper was later seen in a drawer in the house where both parties to the instrument lived, it is held to be a good delivery. where the paper ultimately reached the grantee, because, while the grantor kept control, he had not changed his original purpose, though he was at liberty to do so.

Where one had the mental power to alter his intention and the physical power to destroy a deed in his possession. and dies without doing either, there is but little reason for

saying that this deed shall be inoperative simply because, during life, he might have done that which he did not do. It is much more consonant with reason to determine the effect of the deed by the intention existing up to the time of death than to refuse to give it that effect, because the intention might have been changed. *Newton v. Bealer*, 41 Iowa 334, at 339; *Lippold v. Lippold*, 112 Iowa 134, 136; *Trask v. Trask*, 90 Iowa 318; *Albrecht v. Albrecht*, 121 Iowa 521, at 524, 525; *Hogan v. Sullivan*, 114 Iowa 456; *Munro v. Bowles*, 187 Ill. 346; *Hutton v. Cramer*, 10 Ariz. 110 (85 Pac. 483); *Dettmer v. Behrens*, 106 Iowa 585, 589; *Sneathen v. Sneathen*, 104 Mo. 201 (24 Am. St. 326).

In *Criswell v. Criswell*, 138 Iowa 607, there was not a moment, after the father told the nurse what to do with the paper, when he did not retain the power to demand and obtain its return, and, therefore, not a moment when he did not have the paper under his control. But we held that, despite this, the paper was effectively delivered when, after the death, this custodian found that it named a certain son as grantee, and thereupon handed him the paper. In *White v. Watts*, 118 Iowa 549, at 552, we held that the fact that the grantor had power to recall was not controlling, where he said nothing and did nothing, after he left the paper with another, to be delivered to the grantee after death, and never called for the paper. In *Stevens v. Hatch*, 6 Minn. 64, a new deed was made, to correct a misdescription. The grantor wrote the grantee that the new deed was in the grantor's safe, and that he would rather not record it until he saw grantee, in order that both might see, before recording, whether all was right. Grantee acceding to this, it was held that the new deed was well delivered. How does this differ, in effect, from the keeping of the deed at bar in the box of the grantor? Why does such retention destroy delivery, if keeping the deed in the safe of grantor will not?

III. As to the effect of keeping control, *Foreman v. Archer*, 130 Iowa 49, at 52, 53, 54, is almost conclusive against the decree below. In that case, a grantor made a deed, and reclaimed it from a person with whom she had deposited it. She then placed it in a satchel near her bed, merely instructing a Miss Kinsley that the latter should, if anything happened to grantor, notify relatives, so that they might know where the paper was. In the case at bar, the deed was kept in grantor's box. In the *Foreman* case, it was kept in grantor's satchel. In the case at bar, the grantee knew where the deed was. In the *Foreman* case, those interested were to be advised only after something happened to the grantor. It is surely true that, in the *Foreman* case, the grantor kept control of the deed by keeping it in her satchel, and that she might, at any time, have destroyed it. Not only that, but she avowed that she was keeping the paper where it was, so that she might change her mind; she "wanted to retain it, so, if the children went wrong, I could change it if I wished to." We held there was a good delivery. We point out that grantor never expressed a wish or desire that her grandchildren should not have the property, unless that could be implied from her act in having regained possession of the deed from the original depository. And we say that the fact that grantor desired to retain deed, in case she saw cause to change her mind because the children went wrong, indicated an intention that the conveyance should be given effect upon her death.

We hold that the decree cannot be sustained merely because grantor kept the deed in his own box, and retained the power to destroy the deed—a power which he did not exercise. We recur to the point that all required is evidence that grantor intended to pass title.

IV. In determining the intention with which grantor leaves the deed with another, evidence of any declarations or conversations on the subject, at that time or a subsequent

one, is competent. *Dean v. Parker*, 88 Cal. 283 (26 Pac. 91); *Corker v. Corker*, 95 Cal. 308 (30 Pac. 541). Delivery will be presumed from very slight circumstances when, by declarations or otherwise, the grantor has uniformly avowed an intention to convey the land to grantee. *Crabtree v. Crabtree*, 159 Ill. 342 (42 N. E. 787); *Sneathen v. Sneathen*, 104 Mo. 201 (24 Am. St. Rep. 326, 330); *Newton v. Bealer*, 41 Iowa 334, 340; *Walker v. Walker*, 42 Ill. 311, approved 41 Iowa 334, at 340; *Doe v. Knight*, 5 Barn. & Cres. 671, at 672, 686, 687. When one has the burden of showing consideration for a note, a prima-facie supporting consideration is made out by showing that, when deceased delivered the note, he stated that he was doing so in order to protect her in what he was owing her. *In re Estate of Rule*, 178 Iowa 184. It is elementary that subsequent declarations in harmony with the deed are of great weight. It was held, in *In re Geisinger's Estate*, 11 Pa. County Court 168, that a declaration in a will that deeds had been deposited with a third person, to be delivered to grantee after the death of the grantor, is entitled to great weight. Admissions that deed has been made, and is being held for a loan, will establish delivery, though the deed is found with the grantor, since intent is the question. *Chastek v. Souba*, 93 Minn. 418 (101 N. W. 618). Here, when the will was being prepared, the scrivener asked grantor, "What about the property on the south side of the street? What are you going to do about that?" To which it was answered, "I have already deeded that to Anna Eckles." And the deed kept by grantor continued to retain his endorsement that it was deed to appellant's property.

In *Newton v. Bealer*, 41 Iowa 334, at 338, the grantor voluntarily executed a deed to certain lands to a son, reserving the use and occupancy to himself during his lifetime. This deed was kept by the father in a chest with other papers. When, shortly before the grantor's death, one

of his sons suggested the father had better dispose of his property, so there would be no fuss over it when he was gone, he replied that he had fixed that, and, pointing to his chest, said, "After I am gone, the deed will be found in that chest." The last will disposed personal property only. The deed was found in the chest, and handed to the guardian of the grantee. We held that "he thus manifested an unequivocal intention, within a very short time of his death, to have this deed operate as a disposition of his property." The *Bealer* case cites with approval from *Stow v. Miller*, 16 Iowa 460, 463:

"If a father dies, leaving among his papers a deed of land, duly executed in form to one of his children, the law will give effect to the same, if there is anything indicating the intention of the intestate that it should become effective."

In *Hutton v. Cramer*, 10 Ariz. 110 (85 Pac. 483), the facts are almost identical, except that the paper was placed in a box owned by the grantee. But this difference is eliminated, because it was arranged that the grantor have access to the box, and because the case finds a good delivery though grantor "might have regained possession" under this arrangement. The grantor said:

"I have the paper made out, and I would like to go and deposit them in your box in the bank."

The papers were placed there in an envelope, with the grantee's name written thereon, and the grantor remarked:

"This contains what I am going to give you after I am dead; keep that here until I am dead."

After the death, a deed to this grantee was found in the box, with a written declaration, stating that deed had been made to him, and giving the reasons. It was held that the grantor had parted with the possession of the deed, without intending to reserve any right to recall. In *Albrecht v. Albrecht*, 121 Iowa 521, 526, 527, we deemed it important

that it was shown that, after grantor had executed his trust, he so expressed himself as to indicate that he had lost all control over the deed, and hold that his declarations after the alleged delivery indicate that he understood he had parted with the title to the land, although enjoyment thereof during life he had reserved to himself.

4-a

All agree that the delivery is effective if the deed be handed to a third person, with direction to hand over the paper, on death of the grantor. It is so ruled in the *Criswell* case and many others. In that case, the paper was handed to a third person, who did not know its contents, with direction to keep it "until the trouble was over." After the death of grantor, the third person found that a son was grantee, and the paper was then given to him; and we held that the title passed. While, in the case at bar, there was no delivery to a third person, surely it affords at least as strong evidence of intention to part with title as a direction that a third person should keep a paper until after grantor died; for, in the case at bar, the grantor had declared that he could do nothing about willing the property, because he had already deeded to Anna Eckles, the deed was found in his possession, endorsed "Anna Eckles' deed to the south side," and thereupon, the executor handed the deed to Mrs. Ketchum, and she took it and recorded it. And there would seem to be, in effect, little difference between this case and *Arrington v. Arrington*, 122 Ala. 510 (26 So. 152), where a father handed a deed to the mother of reputed illegitimate children, and said to her:

"Take these papers, and, if I die before you do, look after them for the children; and if you die before I do, I will look after them."

The mother did not know what the papers were. It was held to be a vesting of the legal title in the children *eo instanti* upon the death. What is the essential difference be-

tween telling a third person to hand a paper, whose contents he does not know, to a named person, after the grantor dies, and stating that certain property had been "deeded" to a named person, declining, for that reason, to dispose of the property by will, and writing upon the paper that it was the deed of a named grantee to described property? Why do not both amount to a declaration of at least an intention to convey, which is the essential thing on the question of the delivery of deeds, although mere intention is ineffective in the gift of a chattel? For, since delivery may be made by words without acts, or acts without words, or both, it is not required, to make a good delivery, where the paper is handed to a third person, that there shall be, in terms, a direction to hand the deed to the grantee. The rule is well stated in the case of *In re Estate of Rule*, 178 Iowa 184:

"If the instrument be handed over to a third person, under circumstances indicating a purpose to part with control over it, a delivery may be found, even though there is no showing of express instructions to pass it on to the payee, donee, or grantee. An instruction or direction to hold for the benefit of such person is all that is necessary."

All that is essential is proof of intention to part with title.

The facts at bar have at least the force of acts from which it is possible to infer a direction that a paper shall be handed over after the death of the director. *Lutes v. Reed*, 138 Pa. 191 (20 Atl. 943); *Miller v. Meers*, 155 Ill. 284 (40 N. E. 577); *Baker v. Hall*, 214 Ill. 364 (73 N. E. 351); *Crain v. Wright*, 114 N. Y. 307 (21 N. E. 401); *Squires v. Summers*, 85 Ind. 252; *Crabtree v. Crabtree*, 159 Ill. 342 (42 N. E. 787); *Scrugham v. Wood*, 15 Wendell (N. Y.) 545, approved 16 Iowa 460, and 41 Iowa 334; *Stevens v. Hatch*, 6 Minn. 64; *Standiford v. Standiford*, 97 Mo. 231; *Phillips v. Houston*, 50 N. C. 302; *Thompson v. Calhoun*,

216 Ill. 161 (74 N. E. 775); *Gregory v. Walker*, 38 Ala. 26; *O'Kelly v. O'Kelly*, 8 Metc. (Mass.) 436.

In *Anonymous*, 13 Viner's Abr. 23 K. Subd. 12, it was held to be a good delivery where A delivered a deed made to J. S. to J. D., though he did not say it was for the use of J. S. To like effect is *Douglas v. West*, 140 Ill. 455 (31 N. E. 403). In *Doe dem. of Garnons v. Knight*, 5 Barn. & Cres. 671, 672, 686, 687, 691, a witness testified that one Wynne brought to her a brown parcel, and said, "Here, Bess, keep this, it belongs to Mr. Garnons." In a few days, he returned, and asked for the parcel. She gave it to him, and later, he returned a parcel less in bulk than the one he had taken, and said, "Here, put this by." After his death, it turned out to be a mortgage deed to Garnons. It was held to be a good delivery. Now, surely, saying to a third person to keep a parcel, and that it belonged to Mr. Garnons, is not stronger than placing the paper in a box, and saying thereon, "This deed belongs to Anna Eckles Ketchum." This holding was approved in *Jones v. Swoayze*, 42 N. J. L. 279. It seems to us that what was said and done by this grantor have at least the effect of such a direction.

V. It may be argued that an admission that one has "deeded" does not necessarily mean that one had parted with title; that delivery, as well as making a deed, is essential. That may be conceded to be true, as an abstraction. But here was more than a statement that there had been a deed made. The relations between the parties were such as to make it natural that grantor desired the property to pass to the grantee. And the fact that a life estate is reserved tends strongly to prove there was an intention to pass present title. *Ball v. Foreman*, 37 Ohio St. 133; *Sneathen v. Sneathen*, 104 Mo. 201 (16 S. W. 497); *Williams v. Latham*, 113 Mo. 165 (20 S. W. 99); *Thompson v. Calhoun*, 216 Ill. 161 (74 N. E. 775). And the statement of testator

added that the deed took away the right to dispose of the property by will. And this was followed up by endorsing and keeping unchanged the endorsement that the paper was a deed of the property, and was the deed of the grantee. We think all this constitutes a most solemn admission that the deed was delivered; that by it the grantors had parted with the property. It is not impossible that this layman grantor merely described what his hand had done; that he intended to say merely that he had made out a deed, and placed it in his box. As said, so to construe it is not *impossible*, but it is very strained. When an ordinary layman declares he had "deeded," and therefore declines to will, and places the deed in his own safety box, with an endorsement that it belonged to the named grantee, it is strained to hold that, when he says, "I have deeded this property already," he meant merely that he had written out a paper, placed it in a box, but had no intention to convey. Grant that a trained lawyer might, in so remarking, have intended to point out the distinction between a paper merely signed, and not delivered, and one fully executed, as the strictest rules of the law might require, and still we are of opinion that this layman did not intend such definition—meant to say that he intended to part with the title, and that he had, in fact, done so. In the light of all the evidence, we can construe his statement to mean nothing else than that his will was not concerned with this piece of property, because he had parted with it to Mrs. Ketchum, and no longer owned it. It was, in effect, an admission that he had done all, including delivery, that would make his deed effective.

For the reasons stated, the decree of the district court must be—*Reversed*.

WEAVER, EVANS, GAYNOR, PRESTON, and STEVENS, JJ.,
concur.

LADD, C. J., concurs in holding that the evidence exact-

ed a finding that the deed was delivered, but is of opinion that nothing in the record warrants any inference as to how this might have happened, and that none of the cited cases are analogous.

J. R. OWENS, Appellant, v. NORWOOD-WHITE COAL COMPANY, Appellee.

MASTER AND SERVANT: Mine Entry—Failure to Timber. A
 1 mine owner may not say that he was free from negligence, when he knew that the roof in a mine entry was liable to become loose and fall at any time, and failed to timber it.

NEGLIGENCE: Contributory Negligence—Injury in Mine Entry.
 2 A miner, injured by a fall of rock in an entry, may not be said to be guilty of negligence, when the place of injury was not his usual place of work, when he was present at said place under orders of his superior, did not know of the dangerous condition there existing, and was charged with no duty with reference to said place.

**MASTER AND SERVANT: Relative Duties of Miner and Mine
 3 Owner.** A mine owner must timber the mine *entries*. The miner must timber his *working place*.

MASTER AND SERVANT: Assumption of Risk—Unknown Danger.
 4 One may not be held to have assumed a danger of which he was ignorant.

RELEASE: Validity—Mistaken or Fraudulent Statements. A jury
 5 question on the issue whether a release of damages was void is manifestly presented by evidence tending to show that it was obtained for a grossly inadequate consideration, at a time when the plaintiff, an uneducated and inexperienced man, was enfeebled in body and mind, and by mistaken or fraudulent statements, to the effect, among other things, that plaintiff was not permanently injured, had no broken bones, and would be at work in a short time.

APPEAL AND ERROR: Law of Case—Different Record. The law
 6 as to any point in the case, as declared by the court on one appeal, is the law of the case on a subsequent trial or appeal, *provided the record is the same*.

RELEASE: Evidence—Physical and Mental Condition. Evidence 7 of the mental and physical condition of an injured party is admissible on the issue whether a release of damages was procured by fraud or mistake.

EVIDENCE: Opinion Evidence—Inability to Maintain Action. A 8 statement by one who was negotiating for a release of damages "that he was a lawyer of experience, and that the injured party would not be able to maintain an action for his damages," made for the purpose of being acted upon by the injured party, is, in legal effect, a statement of fact.

EVIDENCE: Opinion Evidence—Fraudulent Purpose. An opinion 9 given for the deliberate purpose of deceiving another may be treated as a statement of fact.

Appeal from Polk District Court.—THOMAS J. GUTHRIE,
Judge.

DECEMBER 13, 1919.

REHEARING DENIED APRIL 13, 1920.

ACTION at law, to recover damages on account of personal injuries. At the conclusion of the evidence on the part of plaintiff, the court sustained a motion by defendant for a directed verdict in its favor, and plaintiff appeals.—*Reversed.*

John L. Gillespie, for appellant.

Miller, Parker, Riley & Stewart, C. Woodbridge, and *E. D. Perry*, for appellee.

WEAVER, J.—The injury for which plaintiff seeks to recover damages was sustained August 5, 1908, and this suit was begun in April, 1909. The case has twice before been brought to this court upon appeal. See

1. MASTER AND SERVANT: mine entry: failure to timber. *Owens v. Norwood-White Coal Co.*, 157 Iowa 389, 181 Iowa 948. It is, therefore, unnecessary for us to restate the issues.

Concerning the facts, the following are not the subject of

dispute. Plaintiff is a coal miner by occupation, and, on the day in question, was, and for some time had been, employed in the defendant's mine. In the course of such service, he was assisting the defendant's timberman in the unloading of timbers from a coal car in one of the entries of the mine, and, while he was so engaged, a large mass of slate fell upon him from the roof, or from the angle between the roof and the side of the entry, injuring him very severely. He was carried to his home, but within a few hours was taken to a hospital, where he remained about four days, when he was returned home. While at the hospital, he was visited by Mr. Woodbridge, defendant's attorney and claim agent, and the physician Dr. Cokenower, who treated him. On the day following his return home, he was again approached by the agent, soliciting a settlement of his claim, if any, for damages. This visit was repeated at least once, and perhaps twice, and the negotiations so begun ended in the execution by plaintiff of a written release of the defendant from all claims for damages on account of his injury, in consideration of which Woodbridge, acting for the defendant, paid plaintiff the sum of \$50 in money; also the further amount of \$16.60, to cover his expenses at the hospital; and the company also paid for the services of Dr. Cokenower. Plaintiff admitted giving the release, but pleads in avoidance that it was obtained from him by fraud and mistake.

As we have already indicated, the first trial resulted in a judgment for the plaintiff, and it was from this adjudication that the first appeal was taken. After an opinion affirming the judgment had been filed, a rehearing was granted, and a reversal was ordered because of errors in the charge of the trial court to the jury, and because of the view of a majority of the court that the evidence was insufficient to sustain the plaintiff's plea of fraud, in avoidance of the release which he had executed. As that view

was decisive of the appeal, there was no discussion of the evidence relating to the alleged negligence of the defendant, except that a majority was "inclined to think" that no actionable negligence was shown, and "inclined to the opinion" that there had been an assumption of the risk; but neither proposition was adjudicated, and this is explained by the court, when it there designates the issue upon the release as the "controlling proposition in the case." It is also to be said that, while much of the testimony on these issues is a repetition of that which was given on the first trial, the record as a whole indicates that plaintiff's showing was, in several respects, materially strengthened on the second trial, and that there is nothing in the former opinion which prevents us from passing upon the merits of the case, as they are revealed by the evidence given upon the last hearing.

Following that decision, a procedendo issued from this court, and the plaintiff had the cause docketed for a new trial in the court below. The defendant objected to further trial, and moved the court for judgment in its favor on the record, on the ground that the issues had been determined and finally adjudicated by this court on the first appeal. The trial court adopted this view of the situation, refused to allow a new trial, and entered judgment against the plaintiff for costs. On appeal by the plaintiff to this court, the ruling was reversed (see *Owens v. Norwood-White Coal Co.*, 181 Iowa 948), and the cause was again remanded for trial.

On the second trial, the plaintiff having introduced his evidence and rested, the defendant, without offering or introducing any testimony in its behalf, moved for a directed verdict in its favor. The grounds of such motion, though stated in 22 different forms or paragraphs, may be abridged as follows:

1. That the binding and conclusive character of the

written release of defendant from liability precludes further inquiry into the merits of the case.

2. That, as a matter of law, there is no evidence to support a finding of negligence on the part of defendant.

3. That the negligence complained of was that of a fellow servant.

4. That the evidence shows conclusively that the plaintiff had assumed the risk.

The court sustained the motion, and directed a verdict for defendant, saying that, in its view, plaintiff had failed to show any actionable negligence; but that, in entering the ruling of record, it would be made to show the motion sustained on all its grounds, "so that all questions presented to the trial court may be raised and finally decided on all grounds."

It will readily be seen that, notwithstanding the multiplicity of the formal points made by appellee in support of the ruling on the motion, the disposition of this appeal must depend, for the most part at least, upon our answer to the two questions: First, Was the evidence of defendant's alleged negligence sufficient to take the case to the jury upon that issue? and, second, Was there evidence for consideration by the jury in support of plaintiff's plea in avoidance of the release executed by him? To these issues we now turn our attention.

I. Could the jury, under the evidence, have found defendant negligent, as charged, with reference to its maintenance and care of the entry where plaintiff was hurt? The accident occurred in an entry known in the record as "17 East." Plaintiff's regular employment was that of pump man in another part of the mine; but he had had considerable experience in other forms of mining work, and, on occasion, when his service at the pump would permit, he engaged in other labor, as he might be directed or requested. Entry 17 East had been driven to a point 60 feet be-

yond the place where plaintiff was injured, which was in front of Room No. 7, worked by a miner named Murray. It was the duty of the mine owner or operator to take care of the roofs of the entries, and this duty was performed by a timberman employed for that purpose. The timberman having Entry 17 East in charge was one Grange, who is a witness in this case. As the character of the roof was variable, it was not at all points protected by timbers, those portions in which the overlying rock was found to be of a kind not likely to break or fall being left without such protection; but daily inspections were made, or should have been made, of all exposed roofs, and, upon the appearance of any dangerous condition, timbers were put in, or the loosened rock taken down. In completing 17 East, a portion of the roof near Room No. 7 and a short distance on either side was left without support, on the theory that the rock was safe. On the day in question, the timberman Grange was proposing to timber a section of the roof of 17 East, some 30 or 40 feet to the east of Room 7, and asked plaintiff to assist him. Together they came into the entry, with a load of timbers on a coal car, and, stopping in front of Room 7, began to unload the car, when a large mass of slate fell upon the plaintiff, and caused the injury complained of.

Passing, for the present, the question of contributory negligence by plaintiff, let us inquire what, if anything, is shown from which the jury could find want of proper care on part of the company, with respect to the defect in the roof and the fall of the rock. As we have said, it is the conceded duty of the owner or operator of a mine to keep the entries in proper condition, and use reasonable care to see that the roof is protected, if protection is needed. The company was, of course, not an insurer, but it was bound to exercise reasonable care to maintain the entry as a reasonably safe way for those whose duties led them to use it. To

be reasonable, the care to guard and protect must be fairly proportioned to the nature and extent of the perils to be apprehended. It is the universal testimony of miners that the danger of injury such as plaintiff sustained is both great and constant; that frequent inspection of entry roofs is necessary, for the protection of those using the passageways below; and that, whenever any portion of a rock roof becomes loose or threatening, it should be taken down, or the place should be timbered.

Grange admits that it was his duty to make these inspections every day, and says he did it. He further admits that his attention had been attracted to the overhanging rock which fell upon plaintiff. He says:

"I had been watching that roof every morning, and sounding it. It was what might be called an ugly looking piece of roof. If it had not been for the danger of Jim Murray shooting the timbering out with his shot, I might have timbered that place; but I was busy, and could not get at it. A place is always considered safe when it is solid, and that place was solid that morning. * * * The only reason that piece was not taken down before August 5th was that it remained solid. But even if it was solid that morning, sometime or other it was going to get loose. I looked for it to get loose, sooner or later. I looked for it to be loose every morning."

If there be any doubt whether such evidence was sufficient to take to the jury the question of due care, it disappears when we look to the testimony of other witnesses. Murray, who worked in Room 7, and passed under this piece of roof frequently every day, and who assisted in lifting the plaintiff from the place where the rock struck him down, testifies that he had noticed the threatening appearance of this mass of slate many times, and had reported it to the mine foreman and to the superintendent. He says:

"I told them where the place was, and that was the

place which fell on Mr. Owens. The same piece of slate which fell on Mr. Owens. * * * Before it fell, I had examined it, and it was loose."

Another miner says the roof had been in that condition for a month, and he had called Grange's attention to it. Still another witness, who, until about 5 days before the accident, had been the mine foreman, whose duties called him into and through Entry 17 East every day, speaking of the same place, says:

"I had noticed the condition of the entry in front of Murray's room, and it was not timbered. * * * We had slate down there in front of Murray's room several times. By that, I mean there had been falls,—that is, slips,—pieces fell out. * * * Before I left there, the roof was slippery and roly, but, as far as being loose, I could not say; but it did not look very good. It should have been timbered. * * *. I saw the piece of roof up over the switch points which went into Murray's room. It was a piece of slate that hung down alongside the road, and hung over the roadway; and if that was loose, it was liable to get loose any time; but, of course, if it was solid, it was all right. If it got loose, it was apt to catch somebody. * * *. That entry should have been timbered. * * *. It could have been timbered before I left, and it should have been timbered a week or two before I left, I suppose."

That this showing by the plaintiff was sufficient to take to the jury the question of defendant's negligence with respect to this roof, is so clear as to render argument on that point superfluous. Defendant's suggestion that the negligence, if any, was that of a fellow servant, is without merit, for the obvious reason that the keeping of the roof in reasonably safe condition was a magisterial duty, and Grange, according to his own showing, was, in this respect, a vice principal. It is further argued that, even if this be true, it appears that Grange had inspected the roof that morn-

ing, and found it solid; hence, there was no negligence. But, in view of the testimony of other witnesses, the jury might very properly find that, if Grange did inspect the place, it was not done with proper care or attention.

The defendant contends, however,—and there is evidence tending to show,—that, a short time before this accident, a quantity of slate had fallen or had been taken down at this same point; and it is argued that the witnesses above quoted are speaking of the condition of the roof before that change or repair was made. But no such interpretation can be placed upon the testimony of several of the witnesses, and especially that of Murray, who was present and helped lift the rock from plaintiff's body, and who says, in so many words, that the overhanging mass whose threatening appearance and looseness he had noticed, and of which he had complained to the timberman and company officers, "was the same piece which fell on Owens." If there be any room for question or doubt at this point, its answer depends upon the veracity of the witnesses and the weight and value of their testimony; and this is the function of the jury, and not of the court.

Nor is there any sound basis in the evidence for contending, as a matter of law, that plaintiff is chargeable with contributory negligence. The point where he was injured was not his usual place of work, nor was it

2. **NEGLIGENCE:**
contributory
negligence: in-
jury in mine
entry.

the place of the timbering in constructing which he was to act as helper to Grange, nor in a place where, by his own labor, he was creating the dangerous conditions of which he now complains. The united testimony of all the witnesses connected with the mine is that it was not his duty, nor was he expected to care for the roof of the entry at that place. He was under the command of the timberman, whose duty it was to make daily inspection of the entry, and plaintiff was entitled to place at least some de-

gree of reliance upon the assumption that such duty had been performed.

It is a matter of common knowledge, as is illustrated in nearly every mining case coming before the courts of this state, that the organization and duties of workmen in coal

mines are, to a very great extent, defined by customs and rules which are the outgrowth of long experience, and have come to be recognized and observed as the law of the mine,

3. MASTER AND SERVANT: relative duties of miner and mine owner.

by both miners and operators. Among them, none is better established than that which, while requiring the miner to prop or otherwise protect the roof of his own room or other place where, by his own excavation, he is removing the natural support of the overlying rock, imposes upon the owner or operator the duty to make reasonably safe the entries by which communication between the shaft and the various rooms is maintained, and passage is afforded for miners and laborers moving from place to place, in discharge of the tasks assigned to them.

The witness Grange, who is by no means hostile toward the defendant, says the custom was for the company to take care of the entry to a point about 15 feet from the face—a point which, in this instance, would be considerably to the east of the rock fall in front of Room 7; and that miners, daymen, and drivers, in using the entry, “would rely upon the company’s having taken care of the roof of the entry. It was not customary for miners or teamsters or the like to sound the roof in the entry, or to inspect the roof. It was the custom for all of them to depend upon the company keeping the entries safe.” Speaking of the time and place of the accident, Grange says:

“Owens had no pick, that I saw, and he did not stop and sound the roof. It was not his duty, nor was it necessary for him to do that.”

Carey, the mine foreman, having 30 years' experience in Iowa mines, says:

"No employee about the mine, other than the timberman, had anything to do with the roofs of the entries, and the timberman would go through the entries in the morning and inspect the roof; later on, the miners would go through to their various places of work. And they have nothing to do with inspecting or looking after the roof, as they pass through the entries. * * * The duties of detecting faults, slips, flaws, and dangerous places in the roofs of entries is not the same with timbermen and their help. It was Grange's duty to look after that, and it would not be any of ~~the~~ business or duty of the helper."

There is other testimony to the same effect, but enough has been recited to demonstrate that the question of contributory negligence was also one for the jury; and, in so far as the trial court's ruling is based upon the opposite conclusion, it is manifestly erroneous. What we have here said upon the question of contributory negligence is pertinent, also, to the defendant's plea of assumed risk. There is nothing in the evidence tending to show that plaintiff knew of the defect in the roof, or that, in the exercise of reasonable care, he ought to have known it. The plea of assumed risk is an affirmative defense, and the burden of establishing it is on the defendant.

II. The other inquiry, whether plaintiff made a case for the jury upon his plea in avoidance of the release, is perhaps more debatable, though the proper answer is hardly less certain.

4. MASTER AND SERVANT: assumption of risk; unknown danger.

Prior to his injury, plaintiff was a man in good health, a miner of experience, and was earning \$2.56 per day. He was a married man, dependent upon the earnings of his daily labor for the support of himself and family. The rock which fell up-

5. RELEASE: validity: mistaken or fraudulent statements.

on him was about 8 feet long, and from $1\frac{1}{2}$ to $2\frac{1}{2}$ feet in thickness. In addition to the external bruises and injuries thus resulting to him, plaintiff sustained an "impacted fracture" of the "neck of the left femur," by which phrase, as we understand it, is meant that the head of the thigh or large bone of the leg was broken off near the hip joint. A large blood tumor was also produced, beneath the skin and bruised muscles. "It was," says the physician, "a deeply seated injury to the blood vessels in the small of the back." Except by what the experts call a "fibrous union," the broken bone has never healed or knitted, and plaintiff is badly and permanently crippled.

The physician does not seem to have discovered the most serious injury, the breaking of the thigh at or near the hip socket, or, if he did discover it, he did not so inform the plaintiff, nor did plaintiff know of this condition until after he had executed the release. His injury had rendered him physically helpless, and he was still in bed, suffering much pain, when the settlement was made.

There is much of doubt, if not something of mystery, as to the exact relation of the physician to the parties. It is undisputed that Dr. Cokenower treated the plaintiff until a short time after the release was executed. He says he was called into the case by telephone, but is unable to say from whom the call came. The plaintiff and his wife say he was called by neither of them, nor at their request or direction; that he was not, at that time, their family physician, a sick member of their family being at that time under the care of another physician. Plaintiff further says that, in one of his interviews with the defendant's claim agent, the latter, speaking of the physician, said, "Dr. Cokenower does our doctoring." The claim agent and the physician were together at the hospital where plaintiff was first taken for treatment. Whether they went there together is not stated, but it does appear that they there discussed plain-

tiff's condition. After plaintiff's return to his home, the claim agent and physician together went to plaintiff's home at least once, and the physician thinks they made such joint visit twice. So far as shown, the physician did not, in anything said by him to the plaintiff, urge or advise a settlement, or compromise plaintiff's claim for damages. It does appear, however, that, on such occasion, Woodbridge, the agent, sought and urged a settlement, and, while this was being discussed, the doctor waited in the carriage outside. Plaintiff's evidence is to the effect that, in thus urging a settlement, Woodbridge, after quoting the alleged opinion of the doctor that the injury was temporary only, went out to the carriage, where the doctor was waiting to talk with him and verify the statement made as to plaintiff's condition. Coming back to the sick room, Woodbridge reported that the doctor had just said plaintiff had no broken bones and no very serious or permanent injuries. Plaintiff further testifies that Woodbridge advised him not to go to any lawyer about the matter, and said that he needed no lawyer, for the company would do what was right with him; that defendant was willing to pay him \$75, all told, but he (Woodbridge) would assume to do better than that, and would pay him \$50, and, in addition thereto, would take care of plaintiff's hospital expenses and of the doctor's fees.

Concerning the latter fees, the agent told plaintiff that the doctor was charging \$5.00 per visit, and that, for the treatment already had, and the few visits which might still be necessary, his bill would be nearly \$100. He further stated, according to plaintiff, that he, Woodbridge, was himself a lawyer, having considerable experience in that line; that he had looked into the facts in this case; and that plaintiff had no cause of action; and that, if plaintiff brought suit, the company would refuse to treat with him at all, and would defeat him in the end.

Plaintiff further says that he was impressed with the

friendly attitude of Woodbridge, who promised to do everything in his power to help him, and to try and get the company to pay him half wages while disabled; that he believed and relied upon Woodbridge's statements, and that Dr. Cokenower had said what Woodbridge had reported him as saying; and, being so induced, and being further pressed and influenced by his necessitous condition and the needs of his family, he finally consented to accept the settlement so offered him, and executed the paper or release prepared and presented to him by Woodbridge, without reading it or hearing it read.

It further appears that plaintiff has been a miner from boyhood, having very little education and little business experience, supporting himself and family on his daily earnings; that, at the time he executed the release, he was still suffering much pain, and, because of his pain and weak and nervous condition, he was unable to obtain normal sleep or rest.

Dr. Cokenower, as a witness on the trial, denies that he told Woodbridge plaintiff had no broken bones and no serious injuries, or that he would be able to return to work in six weeks, or that he was charging plaintiff \$5.00 a trip for his services. He admits that he said to Woodbridge, at the hospital, that, so far "as the blood tumor was concerned, it would heal in about six weeks, but as far as the hip was concerned, I did not know. * * * I never at any time told Woodbridge I was charging Owens \$5.00 a trip from my office to his house. I charged \$2.00 per trip. During the conversation at Owens' house, nothing was said by me about Owens' getting back and at his work in six weeks. I did not, in any conversation with Woodbridge, tell him that, in substance."

It is also to be said that the doctor admits that defendant paid for his services; and, on the other hand, it is to be conceded that this fact, while consistent with plaintiff's

409); and, according to the view of this court, the cause had been submitted to the jury on two propositions only: the mental incapacity of the plaintiff, and the alleged misrepresentation of Woodbridge, concerning the time in which plaintiff might reasonably expect to recover from his injuries. This charge to the jury was held to be erroneous, first, because there was no evidence to support a finding that plaintiff was mentally incapacitated—though it is there added that, “had the jury been directed to consider plaintiff’s mental condition in arriving at the effect which Woodbridge’s statement as to the time when he might expect to recover had upon him, there might be some ground for sustaining it.” The other fact issue which the trial court had left in the case was said to be “the representations as to the time within which plaintiff would recover,” and of this, a majority of the court held the evidence insufficient.

The reversal upon that appeal and the order for new trial leave all these questions of fact an open field for investigation; and, as we have already said, it was the duty of the trial court, and, upon appeal, becomes the duty of this court, to say whether, in its judgment, the evidence now presented should have been submitted to the jury.

It is an elementary proposition that the law favors settlements, fairly obtained, of disputed claims. It is no less true that contracts of settlement may be vitiated by fraud or inequitable advantage by either party thereto. To hold otherwise is to offer a premium for the encouragement of fraud and inequitable advantage, which it is the true mission of the courts to prevent. In considering a claim or allegation of fraud in such cases, the court will inquire, not alone into alleged false or deceitful or misleading representations, but into the circumstances attending the transaction, tending to show whether the parties were dealing at arm’s length, and upon equal footing. This is especially

true where the settlement sought to be impeached is one between an employer and an injured employee, made at a time when the employee is still suffering from his injury, and it is alleged that advantage of his weakness, physical, mental, or both, was taken by the employer, to obtain from him a release of his damages upon payment of a grossly inadequate consideration. The reports contain the history of many cases in which the circumstances are not altogether unlike the one at bar, in which the claim is made that a servant has been deceived or misled by the employer as to the nature and extent of his injuries. In many instances, releases alleged to have been so obtained have been adjudged void, while, in many others, the evidence of fraud has been held insufficient; but it is universally held that, if the evidence be sufficient to justify a fair-minded juror in the conclusion that the servant so situated was imposed upon or deceived by the act of the employer, or of those representing the employer, and that, but for such imposition, the release would not have been executed, then the court cannot properly direct a verdict against the servant. It is the contention of the appellee in this case that the alleged statements made by Woodbridge to plaintiff, even if made as claimed, were mere expressions of his opinion, and not representations of fact on which plaintiff was justified in placing any reliance.

Without deciding, by any means, that expressions of opinion by the employer or its agent may not, in some cases, and under some circumstances, be evidence of fraud or fraudulent purpose, we will pass without further consideration all those alleged statements by Woodbridge which may fairly be said to be a mere statement of his private opinion as to the plaintiff's injuries, and confine our attention to those which may not be thus classified. Among the things shown in the plaintiff's evidence in this respect is to be found the following: that, as we have already said, when

Woodbridge was soliciting plaintiff for the release, and trying to persuade him that his injury was not serious or permanent, he went out to the carriage to see the doctor, with the ostensible purpose of ascertaining the doctor's opinion in the matter, and then, returning, told the plaintiff that the doctor said plaintiff had "no permanent injuries, no broken bones, and that he would be able to return to work in six weeks." He is also alleged to have reported to plaintiff that the doctor was charging him for treatment \$5.00 per trip, and that, with two or three additional trips which would probably be required, his bill would be about \$100. These statements, if made, cannot be said to be an expression of the personal opinion of Woodbridge, but were of matters of material fact, and the law applicable thereto is found clearly stated on the last page of our former opinion (157 Iowa 412) as follows:

"Woodbridge was not a doctor, and was not undertaking to give his own opinion, but was attempting to repeat a statement said to have been made to him by plaintiff's own physician; and, if he falsely and fraudulently misrepresented what the doctor said to him, and plaintiff believed his statements to be true, and acted thereon, this would amount to such a fraud as would nullify the receipt and settlement."

Now, the doctor, as a witness, distinctly denies having made either of the statements so attributed to him, and testifies that his mention of a period of six weeks was expressly limited to the period required for the healing of the blood tumor. He says:

"I told him the tissues of the back, the *haematoma* (blood tumor), ought to heal up in about six weeks, without any after effects; but, so far as the hip joint was concerned, I did not know."

This, by no liberality of construction can be made the equivalent of a statement that there are "no broken bones.

no permanent injury," and that plaintiff would be "out of bed and back to work within six weeks;" and, upon the rule of law above quoted from the former opinion, and sustained by numerous authorities, some of which are herein-after cited, the foregoing testimony, which stands undisputed in this record, quite obviously is for the consideration of the jury.

Quite in point is *Haigh v. White Way Laundry Co.*, 164 Iowa 143, a recent case decided by this court. There, the plaintiff, while in defendant's service, sustained a severe injury to her hand, and thereafter defendant obtained from her a written release of her claim for damages, at a small consideration. Later, she brought suit, and was permitted to avoid the settlement, upon a showing that she was misled by the representations of the employer and its agents. These representations were to the effect that her hurt was trifling; that the tendons of her hand were not injured; and that she would soon recover therefrom, and be as well as ever. The court, stating that an expression of an honest opinion could not constitute a fraud, proceeds to say that, while the expression of an opinion as to the length of time required for plaintiff to recover from her injuries necessarily partakes of speculation, and an "honest opinion upon that subject given upon that matter would not constitute fraud," yet the representation that the injury was trifling, and the tendons of the hand were not injured, were "substantive facts," and their assertion, as an inducement to obtain a settlement, had direct bearing upon and relation to the extent of the defendant's liability to the plaintiff. If this be a correct proposition, as we think it is, it must be true in this case that a statement to the plaintiff that his injury had resulted in no broken bones, and was not of a permanent character, when, in truth, he had sustained a broken thigh or hip, one of the most serious fractures which the human frame can suffer, were representa-

tions of very important "substantive facts," and manifestly, if believed and relied upon by the plaintiff, they misled him to his serious disadvantage. Nor, as we shall soon see, is it a matter of decisive importance whether such statements were made with intent to deceive, or were made in entire good faith, in the belief that they were true, if it further appears that they were relied upon, and did, in fact, mislead the plaintiff. It is not now denied that, when plaintiff executed the release, he had, in fact, received the serious injury we have mentioned. Nor is it denied that this fact was wholly unknown to him, and, if known by the physician or by the defendant or its claim agent, neither had revealed that fact to the injured man. For present purposes, it may be conceded that this condition was unknown to all parties, and that they in good faith believed that the injuries were temporary only. In such case, the law does not leave the plaintiff remediless. The question as to the effect of a mutual mistake in such cases was before us in *Reddington v. Blue & Raftery*, 168 Iowa 34. There, the injured servant, six weeks after his injury, executed a written release of his claim for damages. Later, it was found that he had sustained an injury of serious character; and it was held that the release could be avoided, upon showing that the settlement was arrived at and agreed to upon the mistaken belief or supposition that plaintiff's injuries were only such as were then known. So, in the later case of *Malloy v. Chicago G. W. R. Co.*, 185 Iowa 346, the servant had been injured, and, after some treatment, was pronounced well, and fit to work, and a settlement was had and release executed, both employer and employee relying on the physician's statement. It developed, however, that the employee had not recovered, and was unable to work. In holding that the servant could avoid the release given by him, on the ground of mistake, we quoted approvingly from *Houston & T. C. R. Co. v. Brown*, (Tex.) 69 S. W. 651, as

follows (after reference to a physician's statement that a broken arm had knitted, and the arm would be all right) :

"The fact that the statement made by Stewart was not intentionally false does not affect the right of the appellee to have the release set aside, if he was misled by the statement, and executed the release believing the statement was true. In such a case, innocent misrepresentation may as well be the basis of relief as where such statements are intentionally false."

We also said that:

"Though the release is general, covering injuries of every kind and nature, and extending until doomsday, inquiry concerning the nature of the consideration and for what computed was permissible, and, as we think, was not precluded by the terms of the release." *Malloy v. Chicago G. W. R. Co.*, 185 Iowa 354.

The *Haigh* case, *supra*, is also in line with this principle. To the same effect is *McCarty v. Houston & T. C. R. Co.*, 21 Tex. Civ. App. 568 (54 S. W. 421).

The case of *Jacobson v. Chicago, M. & St. P. R. Co.*, 132 Minn. 181 (156 N. W. 251), affords another pertinent illustration of the principle. Plaintiff, a passenger on defendant's railway, was injured in a wreck, and, as in the present case, the injuries so sustained included an impacted fracture of the thigh and dislocation of the sacroiliac joint, and, as in this case, also, this feature of the injury was not discovered until after plaintiff had released the company on payment of \$150. In securing this release, both the physician and the claim agent told plaintiff that he had no broken bones, and that he was suffering only from bruises of a temporary character. In ruling that a release so procured may be set aside, whether the representations to the plaintiff were made with or without fraudulent intent, the court says:

"In such cases, the courts grant relief either upon the

ground of fraud in law, sometimes spoken of as constructive fraud, or mutual mistake. It is not material whether it be termed fraud in law or mistake."

In support of its conclusion it cites our own case of *Haigh v. White Way Laundry Co.*, supra.

In *Marple v. Minneapolis & St. L. R. Co.*, 115 Minn. 262 (132 N. W. 333), the same court had to deal with another case, quite analogous to the one at bar, in that the fraud and misrepresentation charged were in reporting to plaintiff that his physician said he would be well, and able to go to work in three weeks, and there was testimony tending to show that such representation was untrue, and that plaintiff, relying thereon, was misled. This was held to be sufficient ground for impeaching the settlement. The same ruling was had in the similar case of *Peterson v. Chicago, M. & St. P. R. Co.*, 38 Minn. 511; also in *Fleming v. Brooklyn Heights R. Co.*, 95 App. Div. 110 (88 N. Y. Supp. 732).

Again, in passing upon the question whether a release may be disregarded as having been procured by fraud or mistake or inequitable advantage, it is well settled that evidence is admissible tending to show that the settlement was obtained when the party seeking to avoid it was still suffering from his injury, was sick or distressed, or unnerved and unfit to cope with the other party, or to properly apprehend and protect his legal rights.

7. RELEASE: evidence: physical and mental condition.

Referring to this subject on the former appeal, we said that, where such settlements are made with injured and necessitous persons who have not had the aid of counsel, they should be closely scrutinized.

In *Mensforth v. Chicago Brass Co.*, 142 Wis. 546, the plaintiff had been in the hospital 10 days or more when a release was obtained from him upon payment of \$100. In reversing the ruling of the trial court directing a verdict for defendant, it is mentioned as an important circum-

stance that plaintiff was, at the time, still "suffering pain, and was unable to sit up, and not in condition to carefully consider his rights in the matter;" and, after reciting other features of the case, the opinion quotes approvingly from *Atchison, T. & S. F. R. Co. v. Cunningham*, 59 Kan. 722, as follows:

"Where such unseemly haste is made in obtaining settlements with parties who have sustained such serious injuries, and where the amount paid is so trifling and utterly disproportionate to any just compensation, it seems like wasting time to nicely discuss questions of evidence bearing on plaintiff's capacity to transact business."

See, also, *McLean v. Equitable Life Assur. Soc.*, 100 Ind. 127, and *Stone v. Chicago & W. M. R. Co.*, 66 Mich. 76 (33 N. W. 24).

So, too, in *Platt v. American Cement Plaster Co.*, 169 Iowa 330, where a release by an injured employee was set aside, this court held it not error for the court to expressly instruct the jurors that, in determining whether plaintiff fully comprehended the nature and effect of the instrument, they could consider the evidence tending to show that he was lying in bed, prostrated, and distracted by the pain which came to him from the injury he had received.

The rule to be deduced from the precedents is not that, in order to justify an avoidance of a release, it must be established that he was, at the time, a mental incompetent. It is sufficient if it appears that, by reason of bodily injury or infirmity, or mental distraction occasioned thereby, he is, to use the language of the Wisconsin court, *supra*, unable to "carefully consider his rights in the matter," and if it further appears that advantage was taken of that condition by the other party, to obtain a settlement for a very inadequate consideration. Inadequacy alone, if so great as to shock the conscience, has been held enough to require

that the release be avoided. *Russell v. Dayton Coal & Iron Co.*, 109 Tenn. 43 (70 S. W. 1).

There is still another feature of this case which should not be overlooked. We have already noted that, by the ruling of the court below on the first trial, the evidence of

Woodbridge's statement to plaintiff that he was a lawyer, experienced in such cases, had looked into the facts of this case, and found that the defendant was in no manner liable, was taken from the consideration

of the jury, the theory of the court being, as we assume, that these matters were mere expressions of Woodbridge's personal opinion, on which plaintiff relied at his peril. The verdict and judgment on that trial having been for the plaintiff, the appeal taken therefrom by defendant did not involve this ruling, and it was, therefore, not in any way discussed in reversing that judgment; but, in view of the necessity of a new trial, and of the fact that this question remains in the case, where it must have the attention of the court or jury, or both, we think it proper to speak of it.

We have already said that mere expressions of opinion, honestly entertained, do not amount to fraud; but the statement of a fact must be construed as such, even though it partakes in some degree of the nature of an opinion. The physician who says that his patient is or is not afflicted with tuberculosis or with typhoid fever asserts a fact, and not a mere speculative opinion, and the lawyer who informs his client that a given act constitutes a public offense states an alleged fact, even though his statement is based upon his opinion as to the effect of a statute. Even the same language which, under some circumstances, would clearly be classed as an opinion merely, may, under other conditions, be substantive statements, on which, if the hearer rely to his injury, a right of action may be based.

In this case, if the witnesses speak truthfully, Woodbridge dissuaded the plaintiff and wife from seeking independent counsel, telling them it was an unnecessary expense, and invited them to depend upon him and the defendant, and assured them that he spoke as a lawyer of experience, who know the situation, and that they were without any remedy at law. Possibly, a more experienced or more wary man, under less handicap from his injuries and necessities, would not have been content to accept advice so given; but there is no principle of law which says that, if plaintiff did accept it and act upon it, he did so at his peril. *Sanford v. Royal Ins. Co.*, 11 Wash. 653 (40 Pac. 609, 614); also, *Hidden v. Exeter, H. & A. S. R. Co.*, 72 N. H. 422 (57 Atl. 333); *Indiana D. & W. R. Co. v. Fowler*, 201 Ill. 152 (66 N. E. 394); *Kansas City M. & B. R. Co. v. Chiles*, (Miss.) 38 So. 498. Woodbridge, in these statements, was not giving vent to a mere opinion; he was stating facts or matters which he desired plaintiff to accept and act upon as facts, and, for all we need say, statements which he honestly believed true. Having thus invited and obtained the confidence of the plaintiff, the defendant, in whose interest this was done, if it was done, and for whom he thus obtained release from a liability for which (if the plaintiff be otherwise found entitled to recover), the sum paid is a ridiculously inadequate consideration, cannot be permitted to retain the benefit of such release, on the plea that plaintiff yielded to such inducement at his own risk. What we here say is not to be construed as a denial or modification of the rule approved by us in *Haigh v. White Way Laundry Co.*, supra, and *Seymour v. Chicago & N. W. R. Co.*, 181 Iowa 218, that the mere statement of an honest opinion, as distinguished from an assertion of fact, will not amount to fraud, even though such opinion be incorrect. It is only when the statements become, in legal effect,

9. EVIDENCE: opinion evidence: fraudulent purpose.

representations of fact, or the expression of opinion is insincere, and made with ulterior purpose, to deceive or mislead the injured person, that they may be treated as fraudulent. Whether such is their quality and character in any given case cannot often be determined as a matter of law; but the answer to that inquiry, ordinarily at least, is to be deduced, not alone from the words employed, but also from the circumstances attending and characterizing their use; and this, under all ordinary circumstances, is a jury question.

We have held, as is illustrated in the cases cited, *supra*, that the assurance by the employer and by the surgeon that the injured person has recovered from his hurt, and is in physical condition to resume work, is a representation of fact, though having its foundation in opinion, and that a settlement obtained upon such representation will be invalidated, if it later appear that such assurance was false or mistaken. The justice and propriety of this rule is too apparent to require argument.

The principle was applied by us in *Rauen v. Prudential Ins. Co.*, 129 Iowa 725, where the defendant, by its agent, denied liability on an insurance policy, because of an alleged forfeiture, and obtained a release upon payment of a mere fraction of the insurance. The agent's statement to Mrs. Rauen that she had no cause of action, and that the company had a perfect defense, though, on the theory of appellant in this case, a statement of his legal opinion, was, nevertheless, a representation of an alleged existing fact, sufficient to avoid a release so procured. The same rule was applied by the New York Court in a similar case. *Berry v. American Cent. Ins. Co.*, 132 N. Y. 49. In the latter case, the court says:

"The defendant must be presumed to have known that it was liable for the whole loss, and, by falsely representing that, under the law applicable to the case, the policy was

void, when, in fact, it was valid, it induced the plaintiff to rely upon the superior knowledge that it possessed upon the subject, and to surrender to it his claim. This clearly constituted fraud, and there would be manifest injustice in upholding a settlement under such circumstances."

See, also, *Nelson v. Chicago & N. W. R. Co.*, 111 Minn. 193 (126 N. W. 902); *Kelly v. Chicago, R. I. & P. R. Co.*, 138 Iowa 273.

It is true, of course, that, if an injured person, asserting a right to damages, acting freely, and without being in any manner deceived or misled by the other party, sees fit to compromise or surrender his claim for a small consideration, he will not, after executing a release, be permitted to avoid its effect, simply because, on later reflection, he repents his action. It is only where such release has been procured by fraud or by mistake, or under circumstances showing such superior advantage on the part of the releasee as taints the transaction with constructive fraud, that the settlement will be treated as void. When, however, there is any evidence fairly tending to show that it ought to be avoided on any of these grounds, or to justify such finding by a jury, the question so presented is for the jury; and this, we are convinced, is the nature of the case presented by the record. Such being our conclusion, it follows that the judgment of the trial court must be reversed, and cause remanded for a new trial.—*Reversed*.

LADD, C. J., EVANS, GAYNOR, PRESTON, SALINGER, and STEVENS, JJ., concur.

A. M. PRIMROSE, Appellant, v. JAMES PRIMROSE et al., Appellees.

TRUSTS: Evidence—Insufficiency. Evidence held insufficient to establish a trust in real property.

*Appeal from Benton District Court.—B. F. CUMMINGS,
Judge.*

APRIL 13, 1920.

Action in equity to establish a trust in real estate and for an accounting. The facts are fully stated in the opinion. The court below dismissed plaintiff's petition, and he appeals.—*Affirmed.*

B. L. Wick and L. M. Kratz, for appellant.

Nichols & Nichols, for appellees.

STEVENS, J.—Plaintiff and defendants, James, Adam, William, and John Primrose, are brothers, and the sons of John and Julia Primrose, deceased. John Primrose, Sr., died testate, April 27, 1907, in Linn County, and Julia Primrose, in April, 1916. By his will, John Primrose bequeathed to Julia Primrose, in lieu of her distributive share, the rents and profits from his farm, which consisted of 374 acres in Linn County, so long as she should live, and to each of his four daughters, \$3,000, absolutely or in trust, payable after the death of Julia, and the remainder to his five sons, share and share alike, providing, however, that the share of John Primrose, Jr., should be held in trust by his brother James, for a time, and upon conditions named.

In addition to the farm, deceased, at the time of his death, owned a residence property in Cedar Rapids. Some time after the death of their father, Adam Primrose became indebted to the estate upon a note in the sum of \$800, William Primrose upon a note of \$500, and plaintiff upon a note of \$3,400, payment of which was secured by a mortgage upon his interest in the estate. In the fall of 1914, plaintiff became involved in financial difficulties, and went into voluntary bankruptcy, listing among his assets his interest in his father's estate. On July 28, 1915, the trustee

in bankruptcy conveyed plaintiff's interest in all of the real estate to defendants, for a consideration of \$2,800, which was borrowed by them from a local bank, upon individual note. Plaintiff alleged in his petition that, prior to the execution of the trustee's deed, he entered into an oral contract with the defendants, by the terms of which it was mutually agreed that the farm and city property should be appraised; that defendants would take same at the appraised value, and convey the Cedar Rapids property to plaintiff at its appraised value, charge him with the amount of his indebtedness due to the estate, including his share of the amount to be paid to the four sisters, and the \$2,800 paid to the trustee in bankruptcy, and pay him the difference between one fifth of such appraised value and the aggregate amount of the above sums, with interest. He alleges that there is due him under said arrangement the sum of \$1,870.31. By an amendment to his petition, he alleges further that the interest acquired by the defendants by the trustee's deed was, by said oral agreement, to be held by them in trust for him until the death of Julia Primrose; when division and distribution should be made, as alleged; that defendants partially carried out said agreement, by conveying the residence to him, and by the payment of \$250 by James Primrose, who was the executor of the estate. Plaintiff further alleged in said amendment that the defendants subsequently divided the farm, each of the remaining brothers paying to James his share of the amount due plaintiff, who retains and refuses to pay same to plaintiff.

The defendants, in answer, admit numerous allegations of plaintiff's petition, but deny the alleged oral agreement, and that they obligated themselves in any way to pay plaintiff anything.

In addition to the denial contained in their answer, appellees contend that, if the alleged contract is established by the evidence, it is unenforceable, for the following

reasons: (a) That it was without consideration; (b) that it is within the statute of frauds; and (c) that it attempts to create an express, oral trust in real estate, and therefore contravenes the provisions of Section 2918 of the Code. All of the parties to this action were witnesses, and testified fully concerning the transactions between them. The execution of a deed conveying the residence in Cedar Rapids to plaintiff, and the delivery of a check for \$250 by the defendant James Primrose to plaintiff, are admitted. These transactions were had subsequent to the execution of the trustee's deed.

According to the testimony of plaintiff, he went to his brother James, some time after the bankruptcy proceedings were instituted, and told him of his trouble, and said that "there was a chance to get my share of the estate,—that is, buy it from the creditors,—and he said he did not like to mix in with it, and, of course, it was placed where, if they didn't, somebody else would;" that he and James then went to see John, who said he would have nothing to do with the matter, unless it would be of some good to plaintiff; that he would do anything he could for him; that he then went to see William and Adam, who made substantially the same statements as the other defendants. Testifying further as to these conversations, plaintiff, referring to the land, said:

"I mentioned that it ought to be kept in the family, —that we should not allow strangers to get it; and they thought that it was a good idea, too, if it would not lose any money in it."

Plaintiff also testified to a later conversation with the defendants Adam, William, and John Primrose, during which John asked him why he did not come in with them, so as to share in his father's estate; that they requested him to get the money, and pay what he was owing the estate, his share of the \$12,000 to be paid to his sisters, and the \$2,800

paid the trustee in bankruptcy, and told him that, if he would do so, he could come in and share the property with them, according to the terms of the will. All of the defendants denied that they at any time agreed to pay plaintiff the difference between the amounts owed by him, including the purchase price of his interest in the estate, and one fifth of the appraised value thereof. They all admit, however, that they expressed a willingness for plaintiff to have the portion of the estate left him by his father, upon condition that he pay the sums mentioned.

Plaintiff admitted that he endeavored to borrow the money for that purpose, but did not succeed. The record does not sustain the alleged oral contract. The construction most favorable to plaintiff that can be placed upon the several conversations and transactions of the parties is that defendants expressed a willingness, and offered to permit plaintiff, upon the payment of the several sums above mentioned, to share equally with them in the division and distribution of the estate. He does not claim to have paid any part of the amount due the estate or his brothers.

At the request of defendants, the farm was appraised by three men, whose appraisement was taken as the basis upon which the division thereof was made between them, each taking a portion of the land, and paying in cash such sum as was necessary to equalize differences. The claims of plaintiff were not taken into consideration in the division. Counsel for appellant, in argument, rely upon the conveyance of the residence in Cedar Rapids, and the payment of \$250 by James, as strong circumstances tending to corroborate the alleged oral agreement; but, as already stated, the evidence not only fails to establish the alleged agreement, but these transactions are fully and consistently explained by defendants. Concerning these matters, James Primrose testified:

"My explanation of the \$250 sent to Allie is as follows:

I was down in Cedar Rapids, and stayed all night with Al-
lie; and while I was there, we got to talking about running
all over Cedar Rapids, hunting a house to rent, and he
could not find anything less than \$30 or \$35 a month. He
said, 'What are you going to do with the house here?' I
says, 'I don't know, we will either sell it or rent it.' I says,
'Would you take the house and lot, instead of the little
share that is coming to you, and leave that to the boys?'
And he says, 'Yes.' And I says, 'All right, I will see the
boys, and, if they consent to turn the house and lot over
to you, and you can have the house to live in, and you won't
have to run all over Cedar Rapids hunting a house to rent.'
And I asked my brothers, while we were settling up the
last time, and they agreed to sign it over to him, so he
would have a home to live in, without renting. Again, I
say, I asked him if he would take the cash money, after fig-
uring out his note and other things coming out, or if he
would take the house and lot, instead of this cash money,
and he says, 'Yes.' By this cash money, I referred to an in-
terest in the notes, one for \$500 and one for \$800, and I ask-
ed him whether he would take the homestead, and give up
his interest in these notes, and he said, 'Yes,' he would. I
did not have any talk with him to the effect, and nothing
was said about his taking the homestead and the other boys
paying in any interest in the farm, and there was no such
talk as that. I don't know exactly when this talk occurred,
but we had the last settlement, and I reported to the boys
about the talk I had with him taking the homestead and
giving up his interest in the personal property, and the
boys agreed in the same way. There was never a word men-
tioned in my presence between me and the brothers, aside
from Allen, to the effect that he was to have any interest in
the farm, and take the homestead also for his interest in
the farm. There never was any talk between me and Allen
about him coming back in the same condition with refer-

ence to his father's estate after his discharge in bankruptcy as he was before."

It is apparent, from the testimony of this witness, that he either assumed that the notes of defendants Will, Adam, and plaintiff, disregarding interest, which amounted to \$4,700, were, in fact, paid, or that plaintiff should be paid one fifth of the amount thereof, upon the theory that he had lost his interest in the land. As already stated, the \$3,400 note was not, however, paid, and the rest of the defendants refused to pay plaintiff anything, contending that whatever interest he had in the notes of Will and Adam was more than offset by the residence property which they had voluntarily given him. There is no pretense that James was authorized to represent his codefendants in the transaction referred to above, but merely a statement that, upon his suggesting the matter to them, they expressed a willingness to, and did, make the conveyance.

While plaintiff's version of the conversation referred to in the testimony of James, quoted above, does not entirely harmonize therewith in some particulars, it is, on the whole, not more favorable to him.

Appellant has apparently proceeded on the theory that the value of defendant's interest in the estate would be the same if they paid him the amount claimed as it would have been had he paid the amount due them and the estate, and received his share in kind. As a mathematical proposition, this may be true, but there is nothing in the evidence from which an agreement binding the defendants to carry out such an arrangement may be inferred.

No evidence whatever was offered to support the allegations of plaintiff's petition that, in the division of the property, a sum of money was paid to and held by the defendant James Primrose for plaintiff.

So far, we have given no consideration to the legal questions raised by counsel for appellant. As plaintiff has

failed to prove the oral contract alleged, it is unnecessary to do so, and we therefore express no opinion as to whether the alleged oral contract, if established by the evidence, would be enforceable. It follows that the judgment and decree of the court below, dismissing plaintiff's petition, must be and is—*Affirmed*.

WEAVER, C. J., LADD and GAYNOR, JJ., concur.

BERTIE SECOR, Administrator, et al., Appellants, v. JAMES E. SIVER et al., Appellees.

WITNESSES: Competency—Insufficient Objection. An objection
1 to the competency of a witness must specifically state the facts which work incompetency. An objection which simply asserts that a witness is "incompetent and unqualified" is quite insufficient to raise any question of competency.

WITNESSES: Transactions with Deceased—Insufficient Objections.
2 An interested witness may, in an action for damages for fraudulent representations, testify against the administrator of a deceased:

1. As to the description, quality, and value of the several tracts of land which passed in the deal.
2. As to his reliance on the representations.
3. As to the condition in which he found the property which was received from the deceased.

WITNESSES: Transactions with Deceased—Insufficient Objection.
3 An objection that a witness is incompetent to testify to a personal transaction with a deceased does not necessarily raise the point that he is incompetent to testify to a personal communication with deceased.

LADD, SALINGER, and STEVENS, JJ., dissent on the present record.

APPEAL AND ERROR: Review—Retaxation of Costs. Costs taxed
4 to a defeated administrator in his official capacity will not be retaxed, on appeal, to the administrator in his individual capacity, on the mere claim that the administrator brought the action officiously, and not under authority of court.

Appeal from Linn District Court.—JOHN T. MOFFIT, Judge.

MARCH 15, 1917.

OPINION MODIFIED ON REHEARING, APRIL 13, 1920.

ACTION to recover upon a foreign judgment, entered against the defendants James E. Siver and Elizabeth Siver. In connection with such claim, it is further alleged that such defendants, having property liable to be subjected to the payment of such debt, are about to convey it to their two sons, Frank Siver and Ed Siver, for the fraudulent purpose of cheating, hindering, and delaying creditors. Upon these allegations, an injunction is asked, restraining the making, delivery, and record of such conveyance, and for other relief. On trial to the court, the petition was dismissed, and plaintiff appeals.—*Affirmed.*

E. A. Johnson, for appellants.

Redmond & Stewart and *Charles Penningroth*, for appellees.

PER CURIAM.—The defendants James E. Siver and Elizabeth Siver were formerly residents of New York, from which state they removed to Iowa, about the year 1896. While residing in New York, James E. Siver, being the owner of a house and lot in the town of Altamont, exchanged the same with John S. Secor, for a tract of about 90 or 100 acres, lying upon what was locally known as the Hildeberg Mountains. In the exchange, the Altamont property was estimated at \$1,500, and the farm at \$3,500, and payment of the difference was secured by a mortgage upon the land. Later, the mortgage was foreclosed, and the land was sold to Secor at sheriff's sale for \$1,010, leaving a deficiency judgment against the mortgagors of about \$1,700. This judgment was rendered August 28, 1895. In March, 1912, a transcript of this judgment was sent for collection to ap-

pellants' counsel, Mr. Johnson, at Lisbon, Iowa, at which place the judgment defendants then resided. At this time, the defendant James E. Siver held the legal title to two pieces of town property, one alleged to be worth \$1,000 to \$1,200 and another alleged to be worth from \$2,000 to \$2,500. Johnson, meeting Siver, told him of having received this claim for collection, and there was talk between them, contemplating an effort by Siver to borrow from a local banker the necessary money with which to make a settlement or compromise of the demand upon him. The banker in question not being at home, further negotiation between plaintiffs' counsel and the defendant was postponed, to be taken up again the following Monday. Defendant appears, however, to have taken other advice, and telephoned to his two sons, who responded by coming to his home. It is the claim of the father and sons that he was indebted to them, in a manner and to an amount which is not, at this time, material, and that, in payment and satisfaction of such claims, the judgment defendants, husband and wife, undertook to make conveyance of one of said pieces to their son Frank Siver, and the other to their son Ed Siver. The sons then returned to their several homes, with the understanding that the deeds would be made on the following day, and that their father would deliver the same to the county recorder for record, and for return by that officer to the grantees. The deeds were, in fact, executed, and taken to the recorder's office by James E. Siver on Saturday afternoon. The hour was too late to secure their entry on the auditor's transfer book for that day, and the deeds were left in the recorder's hands, with a penciled memorandum on each for its return to the grantee when recorded. Mr. Johnson became aware of these conveyances on Saturday evening, and immediately prepared the original petition in this case, and, on the next day, Sunday, obtained a temporary in-

junction, as therein prayed, and caused it to be served during the day, and before the actual record of the deeds.

The defendants Frank Siver and Ed Siver answered separately, denying the alleged fraudulent character of the conveyances. The judgment defendants, James E. Siver and Elizabeth Siver, answered separately, denying the claim sued upon, and pleading, by way of counterclaim, that they entered into the exchange of the Altamont property for the mountain farm, as hereinbefore mentioned; that they were led and induced to enter into such exchange by the fraud and false representations of said Secor; that said defendants had no practical experience or knowledge with respect to such property as Secor proposed to convey to them; that he represented and described the property as having a thrifty and productive orchard thereon, a fertile soil, a suitable and habitable house, a sawmill, having a good business, and being within convenient reach of growing or standing timber, from which custom sawing could be expected, 35 acres of meadow and pasturage sufficient to keep 8 to 10 cows, and that the property was easily worth the price of \$3,500 which he placed upon it. Believing and relying upon such representations, defendants say they entered into the agreement, conveyed the Altamont property to the said Secor, and gave him the note and bond, or mortgage, upon which the judgment now in suit was procured. They allege, however, that said representations were false; that the house was in a dilapidated and ruinous condition; that the orchard was very largely infected with borers, and would not procure a marketable crop; that the sawmill was a worthless ruin; that there was not pasturage for more than four cows; that the timber fit for sawing in that neighborhood had been exhausted; that most of the land lay on an unproductive mountain side; and that the actual value of the property did not exceed \$1,000, or substantially nothing above or beyond the value of the Alta-

mont property, for which it was exchanged; and that, by reason of the fraud so perpetrated upon them, they have been damaged to an amount greater than the unsatisfied remainder of the judgment rendered against them in the foreclosure suit.

To this counterclaim the defendant demurred, as stating no ground of recovery or set-off in the defendant's favor, and as being matter which should have been set up or pleaded in the foreclosure proceedings. The demurrer was sustained; but, upon defendants' appeal from the ruling, it was reversed by this court, and the cause remanded for trial upon the issue so tendered. See *Secor v. Siver*, 165 Iowa 673. Upon remand of the case to the court below, a trial was had upon the merits, with the result already indicated.

In support of appellants' demand for a reversal of the judgment of the trial court, counsel present and argue several propositions.

I. It is argued that the entire evidence as to representations made by Secor with reference to the land he proposed to exchange with Siver is to be found in the testimony given by Siver and his wife, and that,

1. **Witnesses:** both said witnesses being incompetent to
competency: testify to such matters against Secor's ad-
insufficient ob- ministrator, the court's finding upon that
jection. issue is without support in the record.

Assuming, for the present, that objections to the competency of the witnesses were properly raised, it is doubtless true that some portions of their testimony should be excluded from consideration, in passing upon the merits of the case; but we think it not less clear that the husband and wife were still competent to testify to much of the matter related by them. The familiar statute (Code Section 4604) relied upon by the appellant provides that neither a party to a suit nor the husband nor wife of such party

shall be "examined as a witness in regard to a personal transaction or communication between such witness and a person at the commencement of such examination deceased, against the executor or administrator of such person." Statutes of this general character are to be found in most of the states; but, in the matter of their construction and effect, there have been developed in the several jurisdictions widely varying degrees of strictness and liberality. The ancient rule which disqualified as witnesses all parties and persons having an interest at stake in the litigation no longer prevails, and, as a general proposition, everyone is competent to testify in his own case, the effect of his interest in the result being limited to its legitimate bearing upon the credibility and value of his testimony. To this, the statute mentioned provides an exception. In applying it, this court is committed to the doctrine that such exception should not be enlarged by construction, and that no witness should be held incompetent unless he comes within the statutory description, and then only as to the particular class or kind of testimony concerning which the statute says he shall not be examined. Following that decision, it is well established by our decisions that, while the statute makes a party to the suit and the husband or wife of such party incompetent to testify to personal transactions or communications between such witness and the deceased, yet such incompetence to testify does not extend to transactions or communications had in his or her presence between the deceased and another person. *Lines v. Lines*, 54 Iowa 600; *Smith v. James*, 72 Iowa 515, 517; *Leipird v. Stotler*, 97 Iowa 169; *Dettmer v. Behrens*, 106 Iowa 585; *Foreman v. Archer*, 130 Iowa 49, 51; *Hughes v. Silvers*, 169 Iowa 366.

It has also been frequently held that a party is competent to testify to facts and circumstances from which the truth as to alleged transactions between such party and the

deceased may be inferred, even where his direct testimony to such transaction may be excluded. *Graham v. McKinney*, 147 Iowa 166; *Campbell v. Collins*, 133 Iowa 152; *Curd v. Wisser*, 120 Iowa 743, 745; *Furenes v. Eide*, 109 Iowa 511; *Walkley v. Clarke*, 107 Iowa 451; *McElhenney v. Hendricks*, 82 Iowa 657.

And where the party testifying claims to have been defrauded by false representations made by the deceased, he is not incompetent to testify to his reliance on such representations. *Gray v. Sanborn*, 178 Iowa 456.

It will be observed, therefore, that a party to a suit against the administrator of a deceased person is not, in any general sense of the word, an incompetent witness in his own behalf, and his right to testify to any material fact within his knowledge is unrestricted, except as to the particular matter concerning which the statute provides he shall not be examined: that is, personal transactions and communications between himself and the deceased person.

We are satisfied that the testimony of James E. Siver and wife concerning the deal with Secor was not all vulnerable to the statutory objection, and that enough was admissible to make the issue one of fact, and not of law. Under our practice in equitable actions, all evidence offered is generally preserved in the record, subject to such objections as may be made thereto by either party. On appeal to this court, we must presume that the trial court disregarded all testimony which was vulnerable to the objections made, if any, and that its conclusion was based solely upon the admissible evidence. If, on a review of the record, we find that it fairly presents an issue in fact for judicial determination, we have then only to consider whether, in our judgment, the decree below is or is not substantially correct; and, while the hearing in this court is *de novo*, it is always had with due recognition of the fact that the trial court is better situated to properly estimate the veracity

of witnesses and weight of their testimony than are we, and its opinion with reference thereto is entitled to our consideration.

II. The scope of our consideration of the alleged incompetency of witnesses necessarily depends upon the character of the objections raised by the appellant in the court below. It is the settled rule in this and in most courts that objections to the incompetency of witnesses must be made specific, and set forth the grounds or facts which, it is claimed, render their examination improper. An objection to the evidence offered is not sufficient to raise the question of the competency of the witness, and, if the specified objection is found not to be well taken, the party making it cannot, on appeal, avail himself of another objection which he has not specified. The abstract in this case discloses that part of the evidence used in the court below was in the form of a transcript or depositions, and that, when the testimony of the defendant James E. Siver was offered, and before any part of it had been read, the plaintiff entered the following objection:

"Plaintiff objects to each and every interrogatory propounded to the witness James Sivers in this transcript, as being incompetent, irrelevant, and immaterial, calling for hearsay testimony, calling for the opinion and conclusion of the witness, and no facts; not the best evidence. The witness is incompetent and unqualified, and the question is leading and suggestive, and the plaintiff moves to strike out each and every part of each and every answer made, for all the reasons stated in the foregoing objection."

To this was added a "concession," in the following form:

"It is conceded that the foregoing objection and motion shall stand without repetition."

At a later stage of the trial, another deposition by James E. Siver was introduced. Therein, the witness first

identified himself as the judgment defendant, and stated that, in the year 1893, he owned a certain residence property in the town of Altamont, New York, of the value of \$1,500. At this point in the examination, the following entry was made:

"Objected to by plaintiffs as incompetent, irrelevant, and immaterial, leading, suggestive, and hearsay, and not the best evidence, calling for the opinion and conclusion of the witness, and no fact. It is a voluntary statement of the witness, calling for the mental operations of the witness; and also that the witness is incompetent to testify as to matter inquired about, and also incompetent under the statute prohibiting the witness, as a party to the suit, from detailing personal transactions with a person since deceased, and involving the matters in controversy as against the administrator in this case. Plaintiffs move to strike each and every answer and each and every part of each answer, for the same reasons as stated in the foregoing objection."

By agreement of parties, this objection stands "to each and every interrogatory propounded to the witness."

The foregoing constitutes the entire record of the objections to the competency of James E. Siver to testify. The first is manifestly insufficient to raise the question which appellant argues to this court. As will be seen, this objection, so far as it relates to the witness, is simply a general assertion that he is "incompetent and unqualified." It does not direct the attention of the court to the fact or facts which, to counsel's mind, make him incompetent. An offered witness may be wholly incompetent to testify at all, because of want of capacity to understand the obligation of an oath; or his incompetence may be limited to certain matters, knowledge of which he has acquired in professional confidence, as an attorney, a physician, or a priest; his marital relations may be such as to exclude him from the

witness stand; or his interest as a party, or otherwise, may render him incompetent to testify to transactions or communications between him and a person since deceased. It is the right, both of the trial court and of this court, as well as of the opposing party, to be advised by counsel of the ground of his objection; and, if none be given, it will be treated as waived. In 2 Elliott on Evidence, Section 720, it is said:

"A mere general objection that the witness is incompetent is not, ordinarily, sufficient; the objector must state particularly and specifically the grounds of objection."

This rule is abundantly supported by the authorities generally. For example, in 30 American & English Encyclopedia of Law 973, it is said:

"In many cases, a witness may be competent to testify to some of the facts in issue, though incompetent as to others, and therefore should not be rejected generally. It follows that the objection should be sufficiently specific to enable the court to pass on the competency of the witness as regards the particular facts which he is called to prove, as well as to allow the opposite party to remove the incompetency, if possible."

To the same effect are *Emery v. Vinall*, 26 Me. 295; *Elwood v. Dieffendorf*, 5 Barb. (N. Y.) 398; *Richardson v. Wilkins*, 19 Barb. (N. Y.) 510; *Peters v. Horbach*, 4 Pa. 134; *Brown v. Grove*, 116 Ind. 84; *Foxton v. Moore*, (Iowa) 87 N. W. 492; *Holmes v. City of Fond du Lac*, 42 Wis. 282, 285.

The other objection made later in the case was more specific, and, when interposed to a question calling upon the witness to speak of transactions between himself and

2. WITNESSES:
transactions
with deceased:
insufficient ob-
jection.

deceased, would fairly raise the question of the witness's competency. It is to be noticed, however, ~~that~~, when this objection was made, the witness had not been asked, nor was he attempting to speak of, anything in the nature of a personal transaction between himself and the deceased. His subsequent, direct examination was also confined by his counsel to matters about which, for the most part, he was competent to testify: as, for example, the description, quality, and value of the property which he owned, and of the property which he acquired by the trade, his belief that the latter was as represented, the condition in which he found the property, and conversations which he claims to have heard between his wife and deceased. To this extent at least, the objection to the witness was not well taken. It is quite possible that, in detailing such alleged conversations between his wife and the deceased, the witness at times overstepped the limits of the question put by his counsel; and, unless it shall appear that the objection thereto was waived, the testimony to that extent must be disregarded. But, even if this be done, we are unable to agree with appellant that the defense or counterclaim is without substantial support in the evidence.

What we have here said with reference to the testimony of James E. Siver is quite applicable, also, to objections raised to the witness Elizabeth Siver. These objections are substantially the same as those made to the competency of her husband: that is, that, as a party to the suit, she is not a competent witness to personal transactions between herself and the deceased. Bearing in mind that this statute excludes the witness from testifying, over the opposing party's objection, to either of two things, personal conversations and personal communications between the witness and the deceased, it is worthy of note that

3. WITNESSES:
transactions
with deceased:
insufficient ob-
jections.

the objection made to the competency of the defendants is, in such instance, to his or her right to testify to personal "transactions" with the deceased, no mention being made of personal "communications." It would be going too far to say that the word "transaction" will in no case include or embody the meaning of "communication" or "conversation;" but that, in general, they are not equivalent terms, is quite evident. Had the legislature so regarded them, both words would not have been used. Primarily, a transaction is something done; a communication is something said by one person to another. *Hall v. Hilley*, 139 Ga. 13 (76 S. E. 566).

III. Passing from the question of the competency of the witnesses to the merits of the issue upon the defendant's counterclaim, it is sufficient here to say that the court below was justified in finding the equities to be with the appellees. It may be true that defendants appear to have been "easy marks" for a shrewd and persuasive trader; but the fact that, as a net result of the deal with him, he shortly became the owner of both pieces of property and a deficiency judgment of more than \$1,600 against the defendants, while they were left without a dollar to represent any consideration therefor, makes it very clear that they were grossly overreached in the transaction. If the testimony is to be believed, this was accomplished by misrepresentations of a material character. That defendants were entitled to set up their claim for damages in this action on the foreign judgment was settled upon the first appeal. We find no reason for disturbing the decree of the district court upon the merits of the controversy.

IV. The court below having dismissed the plaintiffs' bill, defendants moved that the costs be taxed to the ancillary administratrix, in her individual capacity, on the

4. APPEAL AND
ERROR: review:
relaxation of
costs.

theory that, in bringing and prosecuting this action, she acted voluntarily and officiously, and without authority of the court. The motion was denied, and the defendants have appealed from such ruling.

The costs appear to have been taxed against the administratrix as such, and there is nothing in the record to indicate that defendants are thereby prejudiced. We cannot assume that the costs will not be paid, as taxed, or that the orders of the court below in that respect will not be observed by the plaintiff. There is no apparent error in the ruling complained of, and the appeal therefrom cannot be sustained.

It follows that, on both appeals, the decree of the district court must be—*Affirmed*.

GAYNOR, C. J., WEAVER, EVANS, and PRESTON, JJ., concur.

STEVENS, J. (dissenting). As the writer interprets the record before us, the conclusion of the majority is erroneous in two particulars: First, in holding the objection of counsel to the competency of James E. and Elizabeth Siver as witnesses insufficient, under the statute, to cover communications; and, second, in holding that any substantial part of their testimony is admissible. The testimony of these witnesses covered two conversations with John S. Secor, and related to the exchange of properties complained of. James E. and Elizabeth Siver were husband and wife, and were sued jointly in this action. The objection of counsel, which is copied in full in the majority opinion, was based upon Section 4604 of the Code, but does not refer more specifically thereto than as "the statute prohibiting the witness, as a party to the suit, from detailing personal transactions with a person since deceased." Both "transaction" and "communication" are used in the statute. The

word "communication" is omitted from the objection. It is, of course, true that the witnesses were competent to testify in their own behalf to any matter not coming within the inhibitions of the statute. The objection specifically challenged the competency of the witnesses to testify to all matters relating to personal transactions with Secor. The inclusion of the word "communication" would have added nothing to the plain meaning and intention of counsel, which manifestly was to have excluded all communications and transactions between the witness and deceased which were material to the issues. The attention of the court was directed to the statute under which counsel claimed the witnesses were incompetent to testify. It may be conceded that the words "transaction" and "communication" are not necessarily synonymous, and that either may exist independent of the other. If we limit the word "transaction" strictly to matters which are immediately connected with and part of a consummated act or contract, it must, nevertheless, necessarily include, directly or indirectly, conversations, communications, and negotiations leading thereto. A communication is not necessarily a transaction, and may not in any way relate to a matter of business; but a consummated transaction of the nature involved in this controversy, as shown by the evidence, included numerous communications and conversations. This court, in *Sheldon v. Thornburg*, 153 Iowa 622, said:

"While the word 'transaction,' as used in the statute, may not, perhaps, be open to any all-embracing definition universally applicable to all cases, it is, perhaps, sufficient for present purposes to say that anything said or done between the witness and deceased, or any act or communication in which they both had any part, and of which both had knowledge, and concerning which the deceased, if living, could speak in corroboration or denial of the statements of the living witness, is a 'transaction,' within the

purpose and intent of the law, and the surviving witness, if disqualified by interest, is incompetent to testify concerning it against the administrator of such deceased person."

This definition was criticized in *Hayes v. Snader*, 182 Iowa 443; but the limitations placed thereon in said case are scarcely applicable to the present controversy. As bearing upon this question, see *Holliday v. McKinne*, 22 Fla. 153; *Harte v. Reichenberg*, (Neb.) 92 N. W. 987; *Cunningham's Admr. v. Speagle*, 106 Ky. 278 (50 S. W. 244); *Whitney v. Brown*, 75 Kan. 678 (90 Pac. 277).

In the opinion of the writer, the objection was clearly sufficient; and, if the witnesses were, in fact, incompetent, under Section 4604, to testify to either communications or transactions with Secor, it should be sustained.

James E. Siver, his wife, and Secor were all present during all of the conversations covered by counsel's inquiry. The conversation of Secor was apparently addressed to both of the defendants, although the conversations were probably had principally with the husband. Occasionally, the conversation between the two men was interrupted by an inquiry of the wife as to various matters relating to the farm, defendant's ability to pay therefor, etc. The conversation appears to have been orderly, and but one of the parties spoke at a time. The matters detailed by the witnesses relate to the same subject-matter. Both defendants were interested listeners to what Secor said. There were not two independent series of conversations, one between James E. Siver and Secor, in which the wife took no part, and another between the latter and his wife, in which the husband took no part, but two continuous conversations, addressed to and participated in by all of them. It does not appear that there was a completed, independent conversation between James E. Siver and Secor, in which his wife took no part, but which she overheard, nor a completed, independent conversation between Secor and Mrs.

Siver, which the husband overheard, but in which he took no part, but both conversations related to a single subject-matter, were continuous, and were participated in by the three parties present. To hold otherwise would be to pervert the facts, and utterly destroy the statute. No doubt, a witness who is incompetent to testify to a personal transaction with a person deceased at the time of the trial, is competent to relate a conversation in which the witness took no part, between such deceased person and a third party. *Lines v. Lines*, 54 Iowa 600; *Smith v. James*, 72 Iowa 515, 517; *Hughes v. Silvers*, 169 Iowa 366; *Schubert v. Barnholdt*, 177 Iowa 232; *Hart v. Hart*, 181 Iowa 527; *Hayes v. Snader*, supra. But the evidence offered clearly related to personal transactions with Secor, participated in by both of the witnesses, and they could not be examined in reference thereto.

For the reasons stated, I would reverse.

LADD, J., concurs in the dissent.

SALINGER, J., concurs in the conclusion reached in this dissent.

C. C. SHOPE, Appellant, v. CITY OF DES MOINES et al., Appellees.

BRIDGES: Determining Approaches and Improving and Paying Therefor. Necessary approaches to a bridge are a part of the main bridge structure, and the determination of the extent thereof, as primarily fixed by the body which determines the extent of the bridge proper, is attended by a strong presumption of correctness. As the bridge proper and approaches constitute a unit, the entire cost, including paving, sidewalking, and grading of incoming side streets, is payable from the bridge fund, even though such paving, sidewalks, and grading, if constructed without being a part of a bridge, would be paid for by special assessments. (So held under Sec. 753-d, Code Supp., 1913.)

Appeal from Polk District Court.—HUBERT UTTERBACK,
Judge.

APRIL 13, 1920.

SUIT to restrain the city of Des Moines and its officers from appropriating funds derived from bridge bonds to meet the expenses of grading, curbing, paving, and building sidewalks on streets near to and approaching University Avenue Bridge from the east. On hearing, temporary injunction was denied, and plaintiffs appeal.—*Affirmed.*

Lappen & Carlson, for appellant.

F. T. Van Liew, E. J. Frisk, H. W. Byers, Reson Jones, C. A. Weaver, Paul Hewitt, and E. J. Kelly, for appellees.

LADD, J.—I. In June, 1917, the city of Des Moines, through its officers, entered into a contract with William Horrabin for the construction of the bridge over the Des Moines River, known as the University Avenue Bridge. The structure is in six spans, extending from Station 20 plus 42 at the east abutment of the bridge, west 887 feet to Station 12 plus 55, "from which point an earth fill shall be constructed to the interurban tracks, said earth fill to commence at Station 12 plus 55 and continue thence west on a uniform grade as shown on plans, which grade shall be the same as that shown for the viaduct structure (over the Chicago & Northwestern Railway Company tracks). The above price (\$335,800) includes the construction of a retaining wall, as shown on Sheet No. 10, and the stairway, as shown on Sheet No. 2 of the plans, and paving and sidewalks over the fill above described to the interurban tracks." Following this is a schedule of prices, and this clause:

"The west approach of the bridge shall begin at a point 392 feet east of the center line of Bluff Street, which point

is immediately east of the tracks of the Interurban Railway, upon and along the center line of University Avenue in the city of Des Moines, Iowa, as shown upon the accompanying plan, and shall terminate at the west line of Penn Avenue. The grade of the bridge and approaches shall be a true uniform line, beginning at an elevation of 20.00 at the interurban track, and terminating at an elevation of 88.00 at the center line of East Seventh Street, which grade is approximately 3.30 per cent. Thence to the west line of Penn Avenue, to an elevation of 98.00 on a grade of 2 per cent.

“(1-b) Work Contemplated: The work shall comprise the complete construction of the bridge proper, together with all excavation and filling of approaches thereto, lying between the Interurban Railway and Penn Avenue, and the approaches in East Seventh Street between Fremont Street and Parnell Avenue. It shall include the construction or reconstruction of any pavements now in place in the streets to be constructed. The character of pavements to be determined by city council. The design of the bridge shall provide, at a suitable point near the boulevard site on the west bank of the river, a suitable and approved type of ramp, or inclined adit, for pedestrian use only, from the ground level to the floor of the bridge proper.”

Money for the construction of the bridge was raised by the issuance of bonds, amounting to \$400,000. This was authorized by Section 758-d of the Code Supplement, 1913, which reads, in part:

“That cities of the first class are hereby authorized to contract indebtedness and to issue bonds for the purpose of constructing bridges.”

In pursuance of the authority so conferred, an ordinance was adopted by the city, providing “for the purpose of procuring necessary funds to pay for the cost of the

construction of the University Avenue bridge and viaduct in accordance with the terms of the contract therefor."

It is to be observed that both the statute and ordinance limit the purpose for which bonds were issued and funds raised for the construction of the bridge, and our first inquiry is whether the improvements east of the bridge, included in the contract, and for which schedule prices were to be paid, constituted a part of the bridge. The courts quite generally hold that, if an approach is essential, to enable persons to reach the main structure, and thereby pass over the stream, and that without it the main structure would have been incomplete and useless as a bridge, such an approach may be found a part of the bridge. In this state, whether an approach is a part of the bridge is held to be an issue of fact. *Moreland v. Mitchell County*, 40 Iowa 394; *Nims v. Boone County*, 66 Iowa 272; *Sewing v. Harrison County*, 156 Iowa 229. In some jurisdictions, the issue is regarded as one of law. *Savannah, F. & W. R. Co. v. Daniels*, 90 Ga. 608 (20 L. R. A. 416), and note. In a case like this, the determination is for the officers of the city having power to act,—ultimately, the city council. That body, as seen, was authorized to construct bridges over the Des Moines River, and to issue bonds out of which to procure money to meet the expenses in so doing. Necessarily, to perform this duty efficiently, it must have ascertained then precisely what would be included in the bridge to be constructed. The test by which to determine whether an approach is a part of the bridge lies in determining whether it is essential to enable travelers to reach the main structure, and thereby pass over the stream, and whether, without it, such structure would be incomplete and useless as a bridge. In *Moreland v. Mitchell County*, 40 Iowa 394, the court, speaking through Miller, J., said:

"The main structure, as it is called, being that part which spans the river, would be incomplete as a bridge

without the so-called approaches. It would be utterly useless as a bridge, because totally inaccessible without the approaches, which are, in fact, a prolongation of the bridge, to enable persons traveling on the highway to cross the river on the bridge. Without the approaches, connecting the highway with the main structure of the bridge, the traveling public would be in the situation of the petitioners for a certain road, in a sister state, which was intended to cross, and a portion of which lay on each side of, a river. They applied, in the same connection, for license to establish and operate a ferry across the river, connecting the two portions of the proposed road. The county court, having jurisdiction of both subjects, granted the ferry license, but refused to establish the road. So, if the county authorities had merely constructed the main structure of the bridge, without any provision or arrangement being made for erecting what is called the approaches, they would have acted as foolishly as did the functionary who established the ferry, but refused the application for the road; and it is very clear that it would have been the duty of the county, in constructing the bridge in this case, to also construct the approaches, as parts thereof."

See *Eginoire v. Union County*, 112 Iowa 558, and other decisions too numerous for citation. These decisions are in harmony with those in other states.

"The term, a bridge," as was said in *Board of Freeholders of Sussex County v. Strader*, 3 Harrison (N. J. L.) 108 (35 Am. Dec. 530), "conveys to my mind the idea of a passageway, by which travelers and others are enabled to pass safely over streams or other obstructions. A structure of stone or wood which spans the width of a stream, but is wholly inaccessible at either end (whatever it may be in architecture), does not meet my ideas of what is meant, in law and common parlance, by a bridge. Sound policy, moreover, requires that we so consider the law as to

compel those persons who erect the structure itself to make it accessible at its ends. It is then that an available passageway will be obtained for the public, when the body of the bridge itself is completed."

In *City of Chicago v. Pittsburgh, Ft. W. & C. R. Co.*, 247 Ill. 319 (93 N. E. 307), the court, speaking through Carter, J., observed that:

"Under the common law, and generally under the statutes in this country, a bridge includes the abutments and such approaches as will make it accessible and convenient for public travel. It has been held in some cases that whether a particular bridge includes approaches depends on the circumstances in which the word 'bridge' is used. (*State v. Illinois Central Railroad Co.*, 246 Ill. 188, 286). What is true as to a bridge and its approaches is equally true of a viaduct and its approaches. Ordinarily, an 'approach,' as that term is used, is considered a part of the viaduct. What would be regarded as approaches would depend largely upon the demands of the traveling public, and 'upon what would be reasonable under the circumstances and local situation in each case.'"

See, also, *Wilson v. Barnstead*, 74 N. H. 78 (65 Atl. 298), where it was said:

"The location of the particular lines which, in a given case, separate a bridge from the other parts of the highway of which it forms a part obviously depends upon the plan of its construction. Such location will differ as bridges differ in plans of construction. It is the duty of the court to construe the statute, and determine what is the meaning of the term 'bridge,' there used; but it is purely a question of fact whether a particular part of the way is upon the bridge, within the meaning of the term thus defined. In this case, there was evidence from which impartial men might reasonably find that the defect in question was a defect in the bridge, within the true meaning of the terms

as used in the statute. No question is or can reasonably be made but that the difference in the levels of the planking and the header appertained to the bridge."

As stated, the grade from the interurban tracks west of the bridge, an elevation of 20.00, to the center line of East Seventh Street, at an elevation of 88.00, is approximately 3.30 per cent, and thence to the west line of Pennsylvania Avenue, at an elevation of 98.00, the grade is 2 per cent. At the east abutment of the bridge, Station 20 plus 42, a cut of 12 feet was required to reach the bridge. This cut extended eastward to East Seventh Street, where the cut was 7 feet below the surface of the street as it previously existed, and the cut extended to the surface at the west line of Pennsylvania Avenue. The cut in University Avenue necessitated the cut north and south therefrom, and the surface appears to have been reached at Parnell and Fremont Avenues. This recital leaves no doubt that it was open for the city council to decide whether these cuts were essential to the making of a passageway over the river. The facts were for that body to determine. The statute conferred the power to construct the bridge, and incident to that power was that of determining, in so far as there might be controversy, the extent and nature of the approach required. In other words, it was for the engineers, in preparing the plans and specifications, and ultimately for the city council, to determine what would be included in the bridge, and this must have been done in the orderly course of business, before directing its construction and providing for the payment of its cost by the issuance and sale of bonds and letting the contract on advertisement of bids. The record before us does not tend in any manner to impeach the finding of the city council. That cutting down East University Avenue and East Seventh Street was essential to render the main structure accessible seems beyond controversy. At any rate, appellants have not met or

overcome the presumption prevailing in support of the findings of the city council.

The only doubt, if any, then, is whether the cut was not more extensive than was required to afford reasonably convenient access to the main structure, and thereby secure a complete passageway over the river; but, as this at most is only a doubt, it was for the determination of the city, and its conclusion ought not to be disturbed by the courts. Having found the reduction of portions of these streets to grade conformably with that of the main structure essential to its reasonable usage as a passageway over the stream, and therefore to constitute a part of the bridge, it was competent for the city council to contract what manner of approach there should be, whether paved as the main structure, or other kind of surface, width, and the like: that is, its authority would be as complete with reference to the approach as it was to the portion of the bridge resting on piers. This is not obviated by the circumstance that the system of paying for street improvements by assessment of benefits against abutting property is and has been in vogue for many years, nor because the cost of improvements near other bridges has been assessed against abutting property. It is enough that the city was authorized to make use of funds raised by the issuance of bonds for the construction of this bridge, and that the pavement here contemplated constituted a part thereof.

We are not concerned with the contracts entered into by the city with the citizens, adjusting claims made for damages consequent on change of grades by improvements of abutting property. The record is such that it cannot be said, as a matter of law, that any portion of the excavation of East University Avenue or of East Seventh Street, or the improvements placed thereon, was unnecessary for the convenient approach to the main structure over the river.

or that the approach was not essential to the use of the structure spanning the river.

II. Appellants argue that the approach might not extend more than 300 feet east from the east end of the structure. By the common law of England, the inhabitants of a county were required to keep in repair public bridges, and also the approaches thereto for a space of 300 feet. See *Rea v. West Riding*, 7 East 588, where Lord Ellenborough said:

"I consider it as having been laid down long ago, by Lord Coke, that the 300 feet of highway at the ends of the bridge are to be taken as part of the bridge itself, being, in the nature of the thing, intimately connected with it, and the exact limits difficult, in some cases, to be ascertained from the continuation of arches beyond the sides of the river. The statute of Henry VIII meant to define the limit, which, perhaps, was uncertain at common law; but the statute still proceeds upon the assumption that there existed a common-law liability for the county to repair the highways at the ends of the bridge, as well as the bridge itself, as appendages to it."

Again, it was said, after citing and commenting upon some authorities, and particularly a case in the time of Edward III:

"From this case it is clear that, in those days, the charge of repairing the highways at the ends of a bridge was considered as belonging *prima facie* to the party charged with the repair of the bridge itself. And the statute of Henry VIII may be considered as having specified the distance of 300 feet from the ends of bridges, for the purpose of reducing to more convenient certainty what should, in all cases thereafter, be considered as the extent and limit of this charge upon the county."

In this country, neither the extent of the approach nor the distance from the ends of the main structure within

which the county shall repair, has been defined. No arbitrary rule exists, and it is quite generally held that the limit is the line indicating the end of the approach on the highway of which it forms a part. See *Wilson v. Barnstead*, supra; *City of Chicago v. Pittsburgh, Ft. W. & C. R. Co.*, 247 Ill. 319 (139 Am. St. 329); *Board of Com. of Huntington County v. Huffman*, 134 Ind. 1 (31 N. E. 570); *Tinkham v. Town of Stockbridge*, 64 Vt. 480 (24 Atl. 761); *Brown County v. Keya Paha County*, 88 Nebr. 117 (Ann. Cas. 1912B, at page 790, and note).

The record does not disclose any misuse of the bridge fund, past or threatened, and the decree dismissing the petition has our approval.—*Affirmed*.

WEAVER, C. J., GAYNOR and STEVENS, JJ., concur.

STATE OF IOWA, Appellee, v. C. ALLEN SNYDER, Appellant.

INDICTMENT AND INFORMATION: Needless Allegations—Abor-

- 1 tion. An allegation in an indictment for murder, based on an attempted miscarriage, that the female was pregnant, in no wise affects her identity, and calls for no proof.

CRIMINAL LAW: Instructions—Permitting Fact to Be Found at

- 2 Nonmaterial Time. When the existence of a fact has its real and only significance at a *certain and definite time or occasion*, it is prejudicially erroneous to permit the jury to find the fact "on or about" a named month. So held in a prosecution for murder, based on an alleged miscarriage, where the fact of pregnancy had no real significance, except on the occasion of a certain visit to the defendant.

Appeal from Dubuque District Court.—J. W. KINTZINGER,
Judge.

APRIL 13, 1920.

INDICTMENT for murder in the second degree. There

was a verdict of guilty, and judgment entered thereon. The defendant has appealed.—*Reversed*.

Nelson & Duffy and *Walter Koerner*, for appellant.

H. M. Havner, Attorney General, *F. C. Davidson*, Assistant Attorney General, and *Charles W. Lyon*, for appellee.

EVANS, J.—The defendant was a practicing physician in Dubuque, on and prior to November 19, 1917. The indictment charged him with the violation of Section 4759 of the Code, in that he unlawfully attempted to produce an abortion upon Grace Wolf, and thereby inflicted upon her injuries from which she died. The errors relied on for reversal are based largely upon the instructions of the court.

1. INDICTMENT
AND INFORMATION : needless
allegations :
abortion.

Section 4759, as it was before its amendment by the thirty-sixth general assembly, was as follows:

"If any person, with intent to produce the miscarriage of any *pregnant* woman, willfully administer to her any drug or substance whatever, or, with such intent, use any instrument or other means whatever, unless such miscarriage shall be necessary to save her life, he shall be imprisoned in the penitentiary for a term not exceeding five years, and be fined in a sum not exceeding one thousand dollars."

By amendment of the thirty-sixth general assembly, the word "pregnant" was omitted from such statute. This amendment appears to have been overlooked, and the indictment was predicated upon the statute in its original form. It is one of the contentions of the defendant that the trial court failed to put upon the State the proper burden of proof on the question of pregnancy. Responding to this complaint, the State contends that the word "preg-

nant" in the indictment was mere surplusage, and that the State was under no burden of proof thereon. The response of the defendant to this argument is that, if the indictment adopted needless particularity in its allegations, the burden still rests upon the State to prove the particular allegations set forth, even though they were needlessly set forth.

Mrs. Grace Wolf was a young, married woman, who lived at Lansing. She visited the defendant's office at about 8 P. M. on November 19, 1917, for professional treatment. Shortly thereafter, she disclosed symptoms of septicemia, and grew worse daily until she died, on December 3d. It is the charge of the State that the defendant did then and there use an instrument upon her, with intent unlawfully to produce a miscarriage, and that her death resulted from such unlawful act on the part of the defendant.

The trial court gave, among others, Instructions V and XXIV, which will sufficiently disclose the basis of one ground of complaint by defendant. These instructions were as follows:

"V. In order to warrant you in finding the defendant guilty of the crime charged in the indictment in this case, it will be necessary for the State to establish each and all of the following propositions by the evidence, beyond all reasonable doubt:

"(1) That, on or about the month of November, 1917, and prior to the finding of the indictment in this case, the said Grace Wolf was pregnant.

"(2) That, prior to the finding of the indictment, and in the county of Dubuque and state of Iowa, the defendant, C. Allen Snyder, with malice aforethought, willfully and intentionally used an instrument upon the body of the said Grace Wolf, with intent thereby to produce a miscarriage of her, the said Grace Wolf.

"(3) That the said Grace Wolf died on or about the 3d day of December, 1917.

"(4) That the use of such instrument by the defendant, with intent to produce a miscarriage of the said Grace Wolf, was the direct and natural cause of her death.

"(5) That the miscarriage of the said Grace Wolf was not necessary to save her life.

"If each and all of the foregoing propositions have been established by the evidence beyond all reasonable doubt, it will be your duty to find the defendant guilty.

"If the State has failed to establish any one of the foregoing propositions beyond all reasonable doubt, then and in that event it will be your duty to find the defendant not guilty."

"XXIV. If you find from the evidence, beyond all reasonable doubt, that, on or about the month of November, 1917, the said Grace Wolf was pregnant, and if you further find from the evidence, beyond all reasonable doubt, that, on or about November, 1917, in the county of Dubuque and state of Iowa, the defendant, C. Allen Snyder, unlawfully, willfully, and feloniously, and with malice aforethought, used an instrument upon the body of said Grace Wolf, and if you further find from the evidence, beyond all reasonable doubt, that said Grace Wolf died on or about the 3d day of December, 1917, and if you further find from the evidence, beyond all reasonable doubt, that the use of such instrument by the defendant, with intent to produce a miscarriage, was the direct and natural cause of her death, and if you further find from the evidence, beyond all reasonable doubt, that the miscarriage of said Grace Wolf was not necessary to save her life, then and in that event it will be your duty to find the defendant guilty of murder in the second degree."

It will be noted from the foregoing that the court laid upon the State the burden of proving beyond reasonable

doubt that Mrs. Wolf was pregnant "about the month of November, 1917." This is the form in which this question was repeatedly submitted and referred to in several instructions. The complaint is that the burden should have been put upon the State to show the fact of pregnancy at the time of Mrs. Wolf's visit to the defendant.

It was not necessary for the State to have alleged in the indictment that Mrs. Wolf was pregnant at the time of the unlawful acts of the defendant. As a mere question of pleading, therefore, we should have no hesitancy in holding that the use of the word in the indictment could be deemed as surplusage. Nor are we disposed to hold that it is a case where the State has put upon itself the burden of proof by needless particularity of description. Illustrations of this class of cases may be found in *State v. Schuler*, 109 Iowa 111; *State v. Hesner*, 55 Iowa 494; *State v. Whalen*, 54 Iowa 753; *State v. Newland*, 7 Iowa 242; *State v. Crogan*, 8 Iowa 523.

The particularity involved in this class of cases relates to description of identity of some essential thing or subject set forth in the indictment. For instance, in an information for selling or keeping for sale intoxicating liquors, if it be alleged therein that the intoxicating liquor was *whisky*, such allegation must be proved, as laid. In such case, it would not be sufficient to show the selling or keeping for sale of *beer*. Also, upon indictment for maintaining a nuisance, if the building be described by particular numbers or other specific description, the defendant is not put upon his defense as to any other building. In such cases, the very specification narrows the charge, and eliminates consideration of any offense outside of such specification. The necessary result is that the defendant is not put to a defense as to any matter not covered by the specifications of the indictment.

To say of Mrs. Wolf that she was pregnant is not de-

scriptive of her identity, nor does it affect her identity in any way. Whether the allegation were true or otherwise, her identity is unmistakable, in either event. It follows that the crime with which the defendant was charged could have been perpetrated, even though Mrs. Wolf were not pregnant. It is enough, in such a case, that the defendant, believing her to be in such condition, used instruments, with the unlawful intent to produce a miscarriage, and that she died as a result of the injuries thus inflicted.

Having thus stated this broad proposition, it must yet be said that it does not fully meet the question of alleged error in the instructions on this point. Notwithstanding

that the fact of the pregnancy was not a material allegation in the indictment, yet the fact, if such, was an important circumstance, which had a very direct bearing upon the question of guilt or innocence. Under the evidence in this case, the guilt or innocence of the defendant could not be determined without passing upon such fact. If the allegation of the indictment had, therefore, been deemed surplusage, and had been treated as such, yet the court could properly have incorporated this question as one of the subjects of its instructions. Inasmuch as the court did do so, the fact that the word "pregnant" was mere surplusage in the indictment will not cure error in the instructions actually given, if they failed to put the subject before the jury in the light of its real significance.

The fact of pregnancy in October and November was virtually undisputed. It was made to appear from the testimony of both sides. The mere emphasis, therefore, in the instructions, laying upon the State the burden of proving the pregnancy "on or about the month of November," tended to conceal, rather than to disclose, the true significance of the question. The evidence for the defense tended to show that Mrs. Wolf's condition had been a matter of great solicitude

2. CRIMINAL LAW:
instructions:
permitting fact
to be found at
nonmaterial
time.

to her for a considerable time before she visited the defendant, and that she had, herself, made efforts with instruments to produce a miscarriage. According to the defendant's evidence, she was already suffering from the symptoms of septicemia, at the time of her visit to him. Her visit there was a matter of comparatively few minutes. There is no evidence of any miscarriage occurring after she left his office. According to the expert witnesses for the State, a post mortem disclosed a punctured wall of the uterus. This was the undoubted cause of the infection which resulted in fatal blood poisoning. The post mortem also disclosed that there was no pregnancy at the time of her death, but that the condition of the uterus indicated that there had been pregnancy and a miscarriage. The really significant question for the consideration of the jury was, therefore, not whether she was pregnant "on or about the month of November, 1917," but whether she was still pregnant at the time of her visit to the defendant. The evidence against the defendant is largely circumstantial. The only direct evidence is the dying statement of Mrs. Wolf. This was formulated and put in writing by an attorney, and signed by her. Her father, as a witness for the defendant, testified that she had afterwards repudiated the statement. Unless the jury could find from the evidence, beyond a reasonable doubt, that the patient was pregnant at the time of her visit to the defendant, it could not properly find that the defendant caused the miscarriage which resulted in her death. This would mean that the miscarriage had been previously produced, either by Mrs. Wolf herself or otherwise. One of the symptoms of the increasing infection was a bad cough, caused by the development of the infection into the pleural cavity. The witnesses on both sides testified to the fact that Mrs. Wolf had a bad cough for at least two days before she visited the defendant. The defendant's testimony

was that she had a temperature of 101° when she visited him.

Upon this state of the evidence, it is clear that, if the attention of the jury was to be directed at all to the question of pregnancy, the question should have been submitted as of the very time of the visit. It is to be said that one of the instructions did properly put the burden of proof upon the State to show the pregnancy as of that time. The difficulty with the record is that this instruction was apparently qualified by other instructions, such as we have above quoted.

Referring again specifically to Instruction V, it put upon the State the burden of proof:

"(1) That, on or about the month of November, 1917, and *prior to the finding of the indictment* in this case, the said Grace Wolf was pregnant."

What possible relation or connection could there be between the time of pregnancy and the time of finding the indictment? The same form of expression is used in one other instruction. Such expression could serve no other purpose than confusion.

There was no occasion for putting the burden of proof on this question in the different forms. The only effect of one was to negative or qualify the other. We do not hold that it was essential that the court should have emphasized the question of pregnancy. But, having done so, it was important that the emphasis should have been held to the particular point of time at which the question had its real significance, in the light of the evidence. The defendant was entitled to have submitted to the jury in some form the hypothesis which his evidence tended to show: that a miscarriage had been produced prior to the visit. Such hypothesis was submitted to the jury in no other manner by the instructions than by this presentation of the question of pregnancy.

If we were to eliminate that question and all that is said thereon in the instructions, on the theory of surplusage, we should so dismember the instructions as to render them wholly inadequate as a presentation of the case. We are constrained to hold, therefore, that there was prejudicial error in the respect herein indicated.

Other errors are assigned. Some of these are interwoven with the question here considered, and we need not discuss them separately. Some are based upon the alleged misconduct of the prosecuting attorney, and others upon the alleged misconduct of the jurors. These are all questions that are not likely to arise upon another trial. In view of our conclusion here announced on the one question, we need not consider these.

For the reason stated, the judgment below will be reversed, and a new trial ordered.—*Reversed*.

WEAVER, C. J., and PRESTON, J., concur.

SALINGER, J., concurs in result.

WEBSTER COUNTY et al., Appellants, v. WASEM PLASTER COMPANY et al., Appellees.

HIGHWAYS: Obstructions—Injunction. Injunction will lie to restrain *interference* with the public officers in removing obstructions from the public highway.

HIGHWAYS: Correction of Erroneous Opening. The opening of a highway *partly* on the line as established, and *partly* to one side thereof, may be later corrected, irrespective of any theory of acquiescence by long user.

Appeal from Webster District Court.—E. M. McCALL, Judge.

NOVEMBER 15, 1919.

REHEARING DENIED APRIL 13, 1920.

SUIT in equity, to restrain the defendants from pre-

venting the agents and officers of plaintiff from removing obstructions from a highway. Decree dismissing plaintiff's petition, from which it appeals.—*Reversed*.

E. E. Cavanaugh and Mitchell & Files, for appellants.

Helsell & Helsell, for appellees.

STEVENS, J.—Plaintiffs allege in their petition that the defendant Adam Wasem is the owner of the northeast quarter, and the defendant Wasem Plaster Company of the southeast quarter, of Section 34, Township 89, Range 28, in Webster County; that, on or about November 29, 1876, a 66-foot highway was established by the board of supervisors on the section line between Sections 34 and 35; that a highway was opened, and that same has been in use for many years by the public; that, on May 15, 1913, the board of supervisors, acting under the authority of Chapter 1-A of Title VIII of the 1913 Supplement to the Code, selected and designated the highway in question as a county highway; that the fences of the defendants on the west side thereof extend into the highway, and at the south end are 2½ feet east of the section line; that, prior to the commencement of this suit, the county auditor caused written notice to be served upon the defendants, requesting the removal of said fences; that defendants failed and refused to remove the same, and threatened the county engineer and other agents of the county, who attempted to remove same, with violence, and by force prevented them from removing same. They ask that the defendants be permanently enjoined from in any way interfering with or preventing such officers or agents of plaintiff county from removing the obstruction from the highway.

The defendants answered, denying generally the material allegations of plaintiff's petition, and setting up numer-

ous defenses; but the principal reliance of counsel may be summarized as follows:

(a) That no highway was ever legally established on the section line between Sections 34 and 35, as claimed by plaintiff; (b) that the defendant's fences have been maintained in their present location for more than 20 years; that the highway, prior to 1910, was open its full width of 66 feet, and that the evidence wholly fails to show that it was not opened on the section line, and therefore there is no proof that defendant's fences extend into or obstruct the highway; (c) that the said highway has been improved by grading, and kept in repair; that the tracks of the two railway companies extend across said highway; that crossings have been constructed over the same, and the highway graded with reference thereto; that all of said improvements have been made with reference to the fences as at present located; and that plaintiff is, by acquiescence therein, deprived of its right to demand that the highway, if not now so located, be opened upon the section line; and (d) that injunction is not the proper remedy.

The original petition, signed by Adam Wasem and others, and bond for the highway were offered in evidence, as was also the commission issued by the county auditor to Thomas Maher, to locate the highway, his report, plat, and field notes, report of appraisers, and the resolution of the board of supervisors, establishing the highway. The petition asked for the establishment of a highway "commencing at the northwest corner of Section No. Fourteen (14) Town. 89 N. of Range No. 28 West; thence south along west line of Sections No. 14-23-26-35 to intersect the Fort Dodge and Homer road or a road in that vicinity, answering the same purpose, and in substance the same." The report of the commissioner states that he distinguished the line of the road by proper marks, mounds, and stakes, as directed in his commission, and as shown on the plat and

by the field notes accompanying the same. The plat locates a highway on the section line between Sections 34 and 35. The resolution of the board of supervisors recites that said road "be and the same is hereby declared established, according to the report of said commission, as shown by the plat and field notes accompanying and made a part of said report, when the same shall be platted and entered upon the Road Record, as herein required, and shall not before."

Due and proper record was thereafter made of all of said matters in the office of the county auditor, so that the resolution establishing said highway became effective according to its terms. Before the adoption of the resolution by the board of supervisors, notice, as required by law, was served upon all owners of real estate affected thereby. No substantial departure from the statute or usual method of procedure in the matter of establishing highways is shown, and the action of the board of supervisors was followed, within a reasonable time, by the opening of a highway, which, all parties concede, has since been more or less in public use.

Sections 34 and 35 were originally surveyed in 1851 by government surveyors, and this survey has been followed by numerous subsequent surveys. The difficulty, as claimed by counsel for appellee, with the several later surveys is that none of them is based upon the original government field notes, and that they are not shown to be in harmony therewith. The south line of the above sections is a correction line, and the corners of the sections adjoining the same on the south are located a considerable distance east.

C. H. Reynolds, who was formerly county surveyor of Webster County, testified that, in 1896, he surveyed Section 5, Township 88, Range 28, lying immediately south of Section 34, and that, in doing so, he verified a prior survey made by him of Section 34, locating the southeast corner thereof. The field notes of his survey of Section 5 and

a plat thereof, duly certified, were recorded and entered upon a book kept for that purpose, which was offered in evidence upon the trial of this case. The witness further testified: .

"In surveying Section 5 and locating the northeast corner, I had occasion to verify my survey by the southeast corner of Section 34. At that time, to assist in verifying that corner, I ran in different directions. I ran lines east and west, that being the correction line, from the northeast corner of Section 5 to the north quarter corner of Section 5; also checking on the southeast corner of Section 34, to cover measurement given on the correction off-set 673.8 feet between the two stones. * * * The government field notes, a copy of them, are still in existence. In the measurement that I made south from the northeast corner of Section 5, down to the quarter corner, where I discovered a stone or mark, I believe I followed the field notes."

Other measurements and lines run by this witness corroborate the correctness of his conclusion that a certain stone found by him at the southeast corner of Section 34 correctly marked the same. In 1896, F. S. Hoyt, county surveyor, made a survey and plat of Sections 34 and 35, at the request of the defendant Adam Wasem, which plat, properly certified, was recorded in the surveyor's record, a book kept for that purpose, together with the field notes of his survey. The record of this survey corresponds with the surveys made by him, and corroborates the testimony of Reynolds. Some time prior to the commencement of this suit, C. A. Snook, county engineer, acting under the direction of the board of supervisors of Webster County, found the stones placed by Hoyt or other surveyors at the southeast and northeast corners of Section 34, and ran a straight line between them. By doing so, he found that defendant's fence extended into the highway as follows:

"At the south end of the line, the fence was on the line;

1,000 feet north, I found the fence 2 feet east of the line between those 2 stones; at 2,300 feet north, the fence is 2 feet east of the line; at 2,640 feet, the fence is 1 foot west; at 3,000 feet, 6½ feet west; at 3,500 feet, 13 feet west; at 4,000 feet, 21½ feet west; at 4,500 feet, 29 feet west; and at 5,280 feet, which is the northeast corner of the section, the fence is 35½ feet west of the stone that I found there."

Section 534 of the Code requires county surveyors to "make all surveys of land within his county which he may be called upon to make, and the field notes and plats made by him shall be transcribed into a well-bound book, under his supervision, at the expense of the person requesting the survey, which book shall be kept in the county auditor's office, and his surveys shall be held as presumptively correct."

No evidence was offered on behalf of defendants indicating error in any of the surveys above referred to. The stone in the highway at the northeast corner of Section 34 and the northwest corner of Section 35 is treated by both parties as correctly located. Other surveys in the vicinity and on the correction line referred to by the witnesses to verify the results of their own work, to some extent corroborate the correctness of their testimony. In the absence of evidence showing error in the surveys offered in evidence and the location of the section line in question, we have no difficulty in finding that the fence of defendants extends into the highway, as claimed by plaintiff.

It is argued by counsel for appellee that plaintiff had a speedy, adequate, and complete remedy at law, and that, therefore, action for an injunction will not lie. As has already been stated, the highway was originally opened and maintained to its full width of 66 feet until 1910, when the owner of the land in Section 35 adjoining the highway moved his fence to the west, reducing the width thereof at the north end to a trifle less than 30 feet.

Section 1527-s17 of the 1913 Supplement to the Code imposes upon county and township boards the duty of improving public highways, and of removing all obstructions therein. The plaintiffs, in attempting to remove the obstruction in question, proceeded in accordance with the requirements of this statute. The highway originally established by the board of supervisors was on the section line, and, if the highway was, in fact, located and opened on the section line, then defendant's fence does not obstruct the same.

Rose v. Gast, (Iowa) 166 N. W. 683 (not officially reported), is cited as sustaining appellee's claim that injunction is not the proper remedy. The holding in that case, denying relief to the plaintiff, was not based upon the proposition that injunction would not lie in the name of the county charged with the duty of opening a public highway, or to remove obstructions therefrom, or to enjoin the owner of a fence in said highway from interfering with or preventing the proper authorities from removing fences or other obstructions from the highway, but was based upon the facts of that case, which showed that a highway established many years before had never been opened, and we refused to enjoin one of the owners from maintaining a fence within the limits of the supposed highway, as established. The case affords no assistance in the determination of the questions presented upon this appeal.

Assuming that the evidence shows that the highway, as opened, does not correspond with the highway as established, and that defendants' fences, in fact, encroach thereon, and that defendants offered violence to plaintiff's agents, who attempted to remove such obstructions, and thereby intimidated them, or otherwise prevented the removal of the obstruction, the court should have enjoined defendants from further interfering with the removal of the fence.

2. HIGHWAYS:
correction of
erroneous open-
ing.

This action was not brought for the purpose of locating or establishing lost corners or boundaries, but to restrain the wrongful interference of defendants with the agents and officers of plaintiff in the performance of their duties. Incidental to the relief sought, the burden is cast upon the plaintiff of proving that a highway was established, and that defendants' fences in fact encroached thereon. This, of course, called for proof of the true location of the section line. In no other way could it be shown that the highway opened does not correspond with the highway established. Plaintiff could not proceed under Section 4228 of the Code of 1897 for the location and establishment of a lost corner or disputed boundary, and could prevent the threatened interference of defendants in no other way than by injunction. *Dickinson County v. Fouse*, 112 Iowa 21.

There is a suggestion in the argument of counsel for appellee that, if the road in question is not, in fact, located upon the section line, it was diverted therefrom for the purpose of avoiding a slough or pond near the south end thereof; but there is nothing in their pleadings or evidence to that effect, nor do we find any evidence in the record that the fences complained of were erected in accordance with the mounds, stakes, or marks of the commissioner appointed by the county auditor to locate and lay out the highway, or that same was diverted for the purpose of avoiding a pond. On the contrary, the record discloses that the south end of the highway is low and wet, and that a grade three feet high was erected, before the road was suitable for travel. The evidence does not bring the case within our holding in *Brause v. Fayette County*, 164 Iowa 606, and other like decisions of this court.

But it is argued by counsel for appellee that, by opening said highway to its full width, and by the erection of grades which have been worked and kept in repair, and by permitting the Illinois Central and Chicago Great West-

ern Railway companies, whose tracks cross the same, to construct and, for a long period of time, maintain crossings and grades in connection therewith, acquiescence by the public in the highway as opened, and the fences as constructed, will be presumed. The doctrine of acquiescence has no application to public highways. The public is not required to open the highway to its full, established width, until necessity arises therefor. This question was fully discussed and decided in *Quinn v. Baage*, 138 Iowa 426, and later re-affirmed in *Bidwell v. McCuen*, 183 Iowa 633. See, also, *Pine v. Reynolds*, 187 Iowa 379.

We reach the conclusion that a highway was established on the section line, as claimed by plaintiff; that defendants' fences project into said highway, substantially as claimed by plaintiff; and that it not only has the right, but is charged with the duty, of removing the same therefrom.

Appellee claims that the land that will be enclosed by the fence, if moved, is underlaid with gypsum, which is of great value; but we do not see how this matter can be taken into consideration in determining whether an obstruction should be removed from a highway.

The decree of the court below is reversed, and cause remanded for decree in harmony herewith.—*Reversed*.

LADD, C. J., WEAVER and GAYNOR, JJ., concur.

L. C. WRIGHT et al., Appellants, v. GEORGE PIRIE et al., Appellees.

SPECIFIC PERFORMANCE: Fraud and Mental Incompetency as Defense. Insufficient evidence of fraud, plus insufficient evidence of mental incompetency, may justify the court, in the exercise of a sound discretion, in refusing specific performance.

Appeal from Greene District Court.—E. G. ALBERT, Judge.
APRIL 13, 1920.

PLAINTIFFS appeal from a judgment of the court below, dismissing their petition praying the specific performance of a contract for the sale and exchange of properties.—*Affirmed.*

Howard & Sayers and Church & McCully, for appellants.

J. A. Henderson and E. B. Wilson, for appellees.

STEVENS, J.—The contract, specific performance of which is asked in plaintiffs' petition, bears date June 12, 1917, and, by the terms thereof, plaintiffs agreed to convey to the defendant George Pirie the N $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Section 18, Township 22, Range 30, subject to a mortgage of \$4,000, and to pay him \$5,000 upon the delivery of the papers, which was to be on or before June 20, 1917, and to assign to him a lease of the above tract for that year, in exchange for the SE $\frac{1}{4}$ of Section 24, Township 83, Range 30, all in Greene County, Iowa, subject to mortgages of \$8,000 and \$5,000, respectively, together with certain personal property, consisting of stock and farm implements, plaintiff to have the crop then growing on the 160-acre tract, which, by a separate oral agreement, defendant was to cultivate and harvest, for which plaintiff agreed to pay him \$50 per month, together with the customary price for board furnished by Mrs. Pirie to extra help on the farm. The \$4,000 mortgage draws interest at 6 per cent, and the \$8,000 and \$5,000 mortgages at 5 $\frac{1}{2}$ and 6 per cent, respectively.

Defendant, for answer to plaintiff's petition, which is in the usual form of actions for the specific performance of contracts, admitted the execution of the contract, but averred that it was procured by the fraud of plaintiff L. C. Wright and others; that it is inequitable and unjust; and that the defendant George Pirie, on account of impaired

health, was incapable, mentally, of understanding and comprehending the nature, scope, and effect of the contract, at the time of its execution.

The defendants were represented in the negotiations, which began on the evening of June 11th, by one Leonard, a real estate agent residing at Grand Junction, and the plaintiff, by one Kirkham, a real estate agent residing at Jefferson, the home of plaintiff, who was engaged in the furniture and undertaking business. Both Wright and Pirle were about 42 years of age, members of the same local lodge, and had known each other for a good many years. Defendant has devoted most of his life to farming, although he has, at times, been employed as a laborer in other occupations. He claims to have but little education, and that he was unable to compute or estimate with reasonable accuracy the aggregate value of his property, or the difference in the values of the various properties of the respective parties.

It was first arranged between Leonard and Kirkham, after a conversation with plaintiff, on the afternoon of June 11th, to solicit defendant to inspect plaintiff's 40-acre tract on the following day, with a view to exchanging his farm therefor. On the morning of the 12th, Leonard went to the home of the defendant in an automobile, from which place he and the defendant went to Jefferson, met Kirkham, and the three together proceeded to inspect the 40-acre tract. After looking over this tract, the same parties went with defendant to Cooper, a near-by town, and then to Jefferson, arriving there about noon. They ate dinner together at a hotel, and, shortly thereafter, went to the residence of plaintiff, where they remained until he came to dinner. Negotiations were opened and continued at plaintiffs' residence until some time in the afternoon, when Kirkham, Leonard, and Wright went with the defendant to his farm, and looked it over, together with his stock and farm imple-

ments; and, while there, an agreement to exchange properties, upon the terms before stated, was tentatively arrived at. The four then returned to Jefferson, and ate supper at a restaurant, after which they went to a lawyer's office, where the contract was prepared and signed in duplicate by Wright and Pirie, and taken to the former's home, where Mrs. Wright signed it; and then the parties named went to the home of defendant, where they arrived about midnight, and plaintiff and defendant went into the house, for the purpose of obtaining the signature of Mrs. Pirie to the contracts. The papers were taken to the bedroom by defendant, she having already retired, where they were signed, and one copy was delivered to plaintiff, who returned with Kirkham and Leonard to Jefferson.

The only claimed misrepresentation of the 40-acre tract is as to its market value. The defendant testified that, while they were on the premises, Leonard falsely stated that plaintiff had a standing offer therefor of \$190 per acre, and that Kirkham affirmed the truth thereof by referring him to a local banker. Pirie further testified that he did not inspect the residence on the 40, because he did not want the place, and so informed Leonard and Kirkham. In this he is corroborated by plaintiff's tenant, who heard part of the conversation. At Cooper, Pirie went to a bank and a store, accompanied by Kirkham, to transact some business; indeed, from the time Pirie arrived at Jefferson, on the morning of the 12th, until the plaintiff left him, about midnight, he was not out of the company of Leonard or Kirkham, and, most of the time after they met Wright in the afternoon, was with all three of them.

Plaintiff testified that, when he met the parties at his home, Pirie proposed a trade of his equity in the quarter section, and his stock and farm implements, for the 40. This is denied by the defendant, according to whose testimony nothing was said about the stock or implements

until they arrived at his farm in the evening. Mrs. Pirie testified that she did not know the stock and implements were to be included in the trade until the morning of the 13th, when she read the contract; on the other hand, plaintiff, Kirkham, and Leonard testified that the terms of the trade were fully explained to her in the afternoon, and that she assented thereto. There is much conflict in the evidence as to what occurred during the day, the defendant, in part corroborated by his wife, testifying one way, and Leonard, Kirkham, and Wright, to the contrary. Likewise, we have the usual conflict in the testimony as to the relative values of the two tracts of land. According to the testimony of plaintiff, the 40-acre tract was worth \$200, the quarter section, \$110 per acre, and the stock and implements, \$2,500. Upon this basis, if the contract were carried out, plaintiff would sustain a loss of \$1,900. Other witnesses fix the value of the 40-acre tract at from \$150, the lowest placed thereon by any of defendant's witnesses, to \$210, the highest value placed on it by any of plaintiff's witnesses; and testify that the 160-acre tract was worth from \$110 to \$140 per acre. A fair estimate, it seems to us, would be about \$130 per acre for the quarter and \$180 per acre for the 40. Estimated upon this basis, taking the value of the personality to be \$2,500, plaintiff obtained an advantage in the trade of about \$2,000.

The testimony regarding the mental condition of Pirie, in substance, is as follows: That he had been considerably worried over the loss of hogs, during the preceding winter; that his wife observed, on the evening of the 12th, that he was pale, although very well that morning; that he retired, shortly after plaintiff left with the contract, but did not sleep; that he expressed the fear to his wife that he had been beaten in the deal; that he was ill, on the morning of the 13th and during the day, and consulted a physician, who testified that he found his heart action ir-

regular, and that he was somewhat nervous and incoherent, and, in his judgment, to some extent unbalanced; that, shortly after June 12th, while plowing corn, he observed plaintiff and Kirkham on the premises; that he got off the plow, and went to the adjoining farm of a neighbor, and said to him:

"I want you to come over; them fellers are here; them fellers that I traded with. I want you to come over, and have them go home."

The neighbor testified that he was crying, when he first saw him, and later in the afternoon, when Wright was present. The neighbor further testified that he told Kirkham he thought they had better go home; that Pirie was not right; and that Kirkham responded that he thought so, too. A niece of defendant's testified that she heard her father tell plaintiff that the defendant was not right, and that plaintiff said, "Yes, I know it." Plaintiff denied this conversation. No other evidence of mental unsoundness was introduced. On the morning of the 13th, defendant went to plaintiff, and offered to trade back; and again on the following day. Plaintiff declined to cancel the contract, telling defendant that he was not in a position to do so. Defendant finally offered \$200 to cancel the trade, but this was declined. Later, negotiations for a settlement failed, on account of a disagreement over \$50 which plaintiff left at defendant's home, on the afternoon of the 12th, as he testified, to bind the bargain.

It will be observed from the foregoing recital that the evidence offered to sustain defendant's plea of fraud and mental unsoundness is not very conclusive. According to the testimony of defendant, he did not, during the negotiations, undertake to ascertain whether he was getting the value of his farm and stock in the trade or not. He testifies that he was not permitted to go by himself for that purpose, or to consult or advise with some other person, and

that he was unable, under the circumstances, to make the necessary computation to enable him to determine the matter. On the other hand, the testimony on behalf of plaintiff tended to show that he did figure it up, and fully understood it. One witness testified that plaintiff said, in the afternoon of the 12th, that he would stay with the defendant until he traded. It is true that Leonard was the agent of defendant, and it is possible that his conduct was inspired by a good-faith zeal to obtain a commission; but it is significant that he, plaintiff, and Kirkham, or some of them, were constantly in defendant's company, and that he was not left alone at any time until the contract was finally signed by his wife, about midnight. We think it apparent that defendant traded reluctantly. He informed Kirkham and Leonard, in the forenoon, that he did not want the 40, and later declined to consider a residence and some Missouri land which plaintiff had for trade. After spending some hours at plaintiff's home, and a short time at defendant's home, and a short time at defendant's farm, and, according to plaintiff's testimony, after an agreement had been reached, to which Mrs. Pirie consented, plaintiff either delivered \$50 to the defendant, or laid same on the table in the kitchen of his home, to bind the bargain.—defendant claiming that he laid it on the table. The parties were not willing to defer the execution of the written contract until the following day, and, for some reason, plaintiff returned, with Kirkham and Leonard, to defendant's home, and went into the house at midnight, with the defendant, to obtain Mrs. Pirie's signature to the contract. These circumstances tend to contradict plaintiff's claim that defendant was seeking and urging the exchange, rather than himself. The record does not reveal plaintiff as a candid witness. As stated, Kirkham, Leonard, and the defendant, after dining at the hotel together, went to the home of plaintiff, shortly after noon, where they

waited for him to come. Upon cross-examination, plaintiff testified that he did not know, when he first saw them, what the parties wanted, and that one of them told him they wanted to talk with him. The fact appears to be that Kirkham and Leonard had talked the matter over with Wright in his store, the day before, and that he knew they were going to take Pirie to look at the 40, the following day. Nevertheless, he sought to leave the impression that he had not seen or talked with Kirkham about it for a considerable time before. A piece of paper, referred to in the evidence as Exhibit 5, was handed to plaintiff for inspection, and he was asked whether he made certain figures thereon. He admitted that he had probably made part of them, but said that he did not know whether it was in connection with a proposed compromise of this controversy or not. The figures appearing on the exhibit were not of particular importance, but bore slightly on one matter; but we have no doubt that they were made by plaintiff, and had reference to the attempted compromise. It is scarcely probable that he would insist upon a specific performance of the contract if he honestly believed that defendant had the advantage of \$1,900 in the trade, or that he would, under such circumstances, have declined the offer of \$200 by defendant, to trade back.

Standing alone, neither the evidence of fraud nor mental incompetency would probably justify the court in refusing a decree of specific performance; but, when considered together with all of the circumstances surrounding the transaction, and the conduct of the parties, we are not prepared to hold that the trial court abused its discretion in denying the prayer of plaintiffs' petition. The contract was inequitable, to the extent, at least, that it allowed plaintiff a profit of \$2,000 or more. Plaintiff is a business man, and has had considerable experience in dealing and trading in real estate; whereas the defendant has been a laborer and

a farmer, and without similar experience; and it is quite possible that, on account of some temporary mental disturbance, he was incapable of resisting the protracted efforts of plaintiff, Kirkham, and Leonard to make the trade. As soon as he was relieved from their presence, it occurred to him that he had made an unfortunate deal, and that he had been taken advantage of; and he promptly went to plaintiff and offered to trade back. He went a second and a third time, finally offering plaintiff \$200 to do so. The first visit was made before there could have been any change in the situation of the parties. And, while plaintiff was, of course, not bound to cancel the contract, if fairly made, simply because defendant was dissatisfied therewith, his refusal, under the circumstances disclosed, is not without particular significance.

It is true, as contended by counsel for appellant, that the discretion which the court may exercise in refusing to decree specific performance is not a captious or arbitrary discretion, but a sound, judicial discretion. The rules applicable to cases of this character are familiar, and the citation of authorities is not necessary. The court below, after seeing the witnesses and hearing their testimony, denied specific performance. We are not prepared to say that, in doing so, it abused its proper discretion. We think, however, that plaintiff should have the right, if he so desires, to pursue his remedy at law for damages for the alleged breach of the contract. Subject, therefore, to the right of the plaintiff to prosecute an action for damages, the decree of the court below is—*Affirmed*.

WEAVER, C. J., LADD and GAYNOR, JJ., concur.

MILT H. ALLEN, Appellee, v. MARY TOUCHEO, Appellant.

APPEAL AND ERROR: Extent of Review of Order Refusing to Open Default. Refusal of the court to set aside a default judgment on the ground of no service will not be disturbed by the appellate court on a record revealing an irreconcilable conflict of testimony.

Appeal from Des Moines Municipal Court.—O. S. FRANKLIN, Judge.

MAY 4, 1920.

APPELLANT moved to set aside a default judgment, entered against her on the ground that she had not been legally served with notice. This is an appeal from the overruling of that motion.—*Affirmed.*

Jordan & Jordan, for appellant.

Milt H. Allen, for appellee.

SALINGER, J.—I. The main point made for the appellant is that the court erred in the exercise of and abused its discretion in refusing to set the default judgment aside. On whether there was due service there is a flat conflict. The return of the sheriff asserts that substituted service was made at the usual place of residence of this appellant. The officer who made the service supports the truth of the return by his testimony. On the other hand, there is testimony that the service was made at a place other than said usual residence. We hold that the court did not abuse its discretion, and that we cannot interfere with its having believed the return and the testimony supporting the same, and, therefore, cannot disturb its resulting action in refusing to set the default judgment aside. See *Pyle v. Stone*, 185 Iowa 785; *McWilliams v. Robertson*, 180 Iowa 281.

II. There is a complaint of the reception of certain testimony. It may not be denied that it presents a serious question, if the record leaves us at liberty to pass upon this complaint. We are constrained to hold that we cannot consider it. Much of it was received without any objection. In several instances, no ruling was had on objections made, and no ruling was demanded. In the instances where objections were overruled, no exception was taken. We cannot entertain the assignment.

Of necessity, this conclusion makes it unnecessary to consider various practice points urged by the appellee.

We are, however, of opinion that the motion of appellee, demanding an assessment of a penalty under Section 4141 of the Code, on the ground that the appeal was frivolous and taken for delay, is without merit.—*Affirmed.*

WEAVER, C. J., EVANS and PRESTON, JJ., concur.

JOHN BUTKOVITCH, Appellee, v. CENTERVILLE BLOCK COAL COMPANY, Appellant.

MASTER AND SERVANT: Insufficient Haulageway in Mine. Neg-

- 1 ligence results from the failure of a mine owner operating under the long-wall system to maintain haulageways for draft animals at a narrower width than eight feet, unless the state mine inspector has *determined* that such width is impracticable. (Sec. 2486-1, Code Supp., 1913.)

MASTER AND SERVANT: Width of Haulageways—Determination

- 2 by Inspector. The statutory "determination" by the state mine inspector that it is not practicable to maintain a haulageway in a mine operated under the long-wall system at a narrower width than eight feet must be a *definite* determination—may not consist of a mere failure to object to a narrower width. Whether such "determination" may be by word of mouth or must be by some formal writing, *quaere*.

WITNESSES: Cross-Examination—Explanation of What Witness

- 3 Means. In an action for injury in a mine haulageway, and on

the issue whether a state inspector had determined that the haulageway could not, in practice, be maintained at a width of eight feet, the inspector may, on cross-examination, testify that, had he made the determination as to the way in question, he would have made it in writing.

NEGLIGENCE: Evidence—Repairs Subsequent to Injury. Repairs

4 to a place of injury subsequent to the time of injury may not be shown for the purpose of establishing negligence at the time of injury, but such evidence may be admissible on other material issues arising in the case.

TRIAL: Permissible Argument. Record reviewed, and held that
5 argument was within the record.

MASTER AND SERVANT: Workmen's Compensation Act—Rejection—Assumption of Risk and Negligence. Assumption of risk

6 and nonwillful negligence are not permissible issues in an action by an injured servant against a master who has rejected the provisions of the Workmen's Compensation Act.

Appeal from Appanoose District Court.—D. M. ANDERSON,
Judge.

MAY 4, 1920.

ACTION at law, brought July 28, 1917, to recover damages for personal injuries sustained February 24, 1915, in an entry of defendant's mine. Trial to a jury and verdict and judgment for plaintiff for \$500. Defendant appeals.—*Affirmed.*

Howell, Elgin & Howell, for appellant.

John T. Clarkson and Wilson & Smith, for appellee.

PRESTON, J.—Plaintiff alleged, substantially, that, on and prior to February 24, 1915, he was in the employ of the defendant, an incorporated coal company, and had theretofore been engaged in mining coal; that, on or about said 24th of February, he was engaged and employed by said defendant as a mule driver; and that, while in the performance of his duty on the twelfth south entry off the

main entry, he sustained an injury, by being caught between two cars of coal, which injury was brought about by reason of the fact that the coal on the cars caught or collided with the sides of the entry or haulageway; that, at the time of the injury, the defendant had given notice rejecting the Workmen's Compensation Law; and that plaintiff had not rejected the law. Defendant denied generally, and alleged that, within three weeks prior to the accident, plaintiff had made complaint that, at the place where he was injured, his coal was ribbing at times; that the mine foreman directed plaintiff to take another man and fix the place so that it would not rib; that, before the accident, plaintiff and such other man did go to said place and take down certain rock, and thereafter told the foreman that it was all right; that the foreman relied upon plaintiff's statements, and believed it had been fixed so that the sides of the entry would not come in contact with loaded cars of coal, and, relying thereon, the said foreman failed to take any action to make the entry higher and wider; that the condition of the entry was the same at the time of the accident as at the time plaintiff reported he had fixed it. By reason of these matters, defendant alleges that plaintiff was estopped from claiming that the entry was low or narrow at the point in question, and is estopped from claiming that defendant failed to exercise ordinary care in maintaining the entry in a reasonably safe condition; that plaintiff's negligence, at and prior to the time of the accident, was the proximate cause of the injury; that plaintiff's negligence contributed to his injury; and that the same was brought about altogether by the negligence of plaintiff. These affirmative matters are denied in plaintiff's reply.

The evidence was such, without conflict as to some matters, and at others upon conflicting evidence, that the jury could have found that defendant's mine was operated on

the long-wall system: that is, the plan is so designed that, after the shaft is sunk to the coal strata, entries are driven in the vein of coal for a short distance; then the works are opened up in circular form, and, from that point onward, all the coal is removed. No pillars of coal are left in as supports; instead, the coal vein being low, refuse material is thrown back and forced up against the roof as tightly as practicable; props placed under the roof lend some support; and, in addition, large blocks of slate are used, to build a wall on each side of the roadway, so that the roof gradually settles down upon the roof, props, and gob. In the long-wall system, main entries are maintained, which go directly from the shaft, and from these, skip or cross entries are constructed; a wall is constructed in these main and skip entries; the skip entries are approximately at right angles from the main entries, though they run more or less in a diagonal or oblique direction to reach the face where the miners are getting out the coal. In this mine, in the main haulageway or entry, a mechanical haulage was in use, where the loaded cars were hauled from the parting or switch, and empty cars were taken from the shaft to such parting; mule drivers hauled empty cars from the parting to the face, and loaded cars from the face to the main mechanical haulageway, or the main parting. In the performance of his duty, plaintiff performed the greater portion of his work on and along what is termed the twelfth south skip entry. As the coal was mined and loaded out, the main entries were prosecuted forward, new skip entries were constructed, beginning at the main entry and driven at approximately right angles. These entries were used as haulageway, through which coal is hauled by animal power. As new skip entries were constructed, the old ones were abandoned and closed. The coal vein is about $21\frac{1}{2}$ feet thick. Under this are about 10 inches of fire clay; and over the coal there are 5 or 6 inches of draw slate; and

above this, what is called a clod, 5 or 6 inches thick; and in some places, another thin layer of slate. Above all these is a hard, strong substance, termed the cap rock, and permanent roof. These substances between the coal and cap rock are ordinarily taken down with the coal, and utilized in building walls for the roadway. In the main entries and in the skip entries, the fire clay underneath is taken out. In the long-wall system, where the coal is taken out, the roof gradually settles down, some 50 feet from the working face, varying according to the amount of gob thrown back, and props and walls. This settling is sometimes called the squeeze. The settling has a tendency to narrow the entries. There is evidence tending to show that, when the settling is going on, it is not practicable to maintain the entries 8 feet wide, but that, after the weight is settled, it is not impracticable. According to defendant's testimony, the entry in question was between 8 and 9 feet wide when it was started, and in the neighborhood of 6 feet at the time plaintiff was hurt. Plaintiff's evidence is that it was somewhat narrower than that. It frequently occurs that the roof settles so that it is necessary to take down a portion of the cap rock, in order to make sufficient height for the mules and cars to pass along. Such was the situation at the place where plaintiff was hurt. What is called a channel in the roof or in the cap rock was made by shooting down a part of it. The place where the cap rock had been shot down, which was immediately over the track, left a space at the high point about 18 inches wide, and at the bottom it was about 45 inches wide, measuring across the entry,—just wide enough for the mule to go through. The cars were low. Upon the sides were boards about 6 or 7 inches wide, placed on edge, and from that, another board, about the same width, forming the wing or flare. After the bed was loaded with the smaller coal, the miners placed large chunks of coal extending to the wings, and it was

these large chunks that came in contact with the so-called channel in the cap rock. Because of the narrowness of the channel, and the coal on the top of the car, extending above the lower edge of the cap rock, the coal on the cars sometimes came in contact with the cap rock, "ribbing," as the driver termed it, because the haulageway was too narrow. Plaintiff claims that the miners did not always load the cars properly, and that the cars were not all loaded the same width; and, as we understand his evidence, he claims that some of the cars were wider than others. Plaintiff's evidence is that the car in question was loaded even with the bed of the car, and defendant's evidence tends to show that it was loaded so as to extend out beyond. Plaintiff says he never had the miners load coal for him to extend beyond the car. A witness for defendant says that, if a chunk of coal would get out an inch and a half beyond the wing, it would catch. Plaintiff says that, while he knew chunks had been pulled off before at other places, he did not know that this was so at the place he was hurt. Prior to his injury, plaintiff complained to the mine foreman that the cars of coal were ribbing, and requested that the haulageway be fixed. Plaintiff at first worked for defendant as a miner, digging coal; but, a few weeks prior to his injury, began working as a driver in the twelfth south entry, and other entries in said mine. At the time plaintiff was injured, he was riding between two cars on the hitching or coupling, between the first and second cars. The chunks of coal, coming in contact with the cap rock, forced the chunks back towards the rear car, causing the cars to leave the track, and injured plaintiff. There is a dispute in the evidence as to whether plaintiff was riding in the proper place, and in the proper way, according to the custom; but the jury could have found that the drivers in this mine, as was the custom in the low coal field, used different means and ways, these varying according to conditions, and that

generally the drivers rode the hitching between the first and second cars.

Appellant has assigned 46 errors. Manifestly, we should not take the space to discuss each one in detail. Some are of minor importance. There is some repetition: that is, the same questions are presented in different ways. We shall take up and consider the points which seem to be of sufficient importance.

1. Ten of the errors relate to the question as to whether or not the state mine inspector had determined the question as to whether it was practicable to maintain the entry at the place where the injury occurred at substantially eight feet in width. The errors relate to the rulings of the court upon objections to evidence, the instructions, and so on. This question is argued at great length, and seems to be one of the main points relied upon. Section 2486-1, Code Supplement, 1913, provides, in substance, that entries in which hauling is being done by draft animals shall be maintained substantially eight feet in width, from one rib or side of the entry or haulageway to the opposite side, etc., provided that the section shall not apply in long-wall work, when the inspector of the district where the mine is located shall determine that it is impracticable to maintain the width of the entry or haulageway as therein provided. The statute does not state whether the determination shall be in writing or otherwise, or how or when it shall be made. Appellant contends that it is not necessary that it should be in writing. The mine inspector for that district was called as a witness for the defendant, who testifies that he was familiar with the statute since its enactment. He testifies that he went through this mine about January, 1914, and that he probably inspected it more closely the first, or possibly the second, time. This was more than a year before

1. MASTER AND
SERVANT: in-
sufficient haul-
ageway, in
mine.

plaintiff was hurt. There may have been settling of the roof after the visit by the inspector. If it had become settled at that time, then, as before stated, the evidence tends to show that it would be practicable to maintain the entries at the required width of substantially eight feet; but the witness testified that he did not, at any time he was there, make such determination. This evidence was brought out on cross-examination, and over objection by defendant. We think it was competent, and that, in view of the direct examination, it was proper cross-examination. At this point, the trial court instructed substantially that, under the undisputed competent evidence in the case, the inspector had not determined that it was not practicable to maintain the entries where plaintiff claims to have been injured, substantially eight feet in width; and that, under the laws of this state, defendant was bound to keep said entry at substantially eight feet in width; and that, if it was less than that, then defendant was negligent in maintaining said entry in said condition; and that such negligence is presumed to have been the proximate cause of plaintiff's injury, and that the burden is then upon defendant to overcome such presumption. The defendant offered instructions on this subject, two of which will be set out. There may be some others involving the same thought, stated in different ways. Instructions 6 and 8, so offered, read:

"6. You are instructed that defendant company was not compelled, in its long-wall mine, to maintain its skip entries any particular width, but was only compelled to exercise ordinary care in maintaining them wide enough to permit the passage of coal that was properly loaded: that is, loaded in accordance with the custom prevailing either in the Hawkeye mine or in this low coal field.

"8. You are instructed that, according to the undisputed evidence, the Hawkeye mine in question, at the time of the accident, was known as a long-wall mine, and that

the skip entries, although commenced at the face and driven eight feet wide, are subjected to what is known as 'squeeze,' which results in making the said skip entry more narrow, the farther the entry at any given point is removed from the face of coal. The evidence establishes, without dispute, that this squeezing process cannot be prevented by the company, and further, that the company is not compelled to maintain its long-wall skip entry at eight feet wide, as originally constructed, but is only required to exercise ordinary care in maintaining its skip entry in an ordinarily safe condition, bearing in mind that the company has a right to assume that those using its skip entries, including the mule driver, and including the miners who load the coal cars, will so use and so load and so haul, in accordance with the general custom prevailing in the Hawkeye mine at the time of the accident, or prevailing in what is known as this low coal field."

Appellant cites 14 Cyc. 236, where a definition of "determine" is given, as follows:

"To decide; to settle; to end; to bring to an end; resolve; to come to a decision; to ascertain or state definitely."

See, also, 18 Corpus Juris 984. He cites, also, *State v. Carter*, 144 Iowa 371, 374, as holding, under another statute, that such words should be so construed as to carry out the plain intent of the statute, without giving such words a technical meaning. Appellee's contention is that determination, within the meaning of the law and the power vested in the mine inspector, is, in effect, an order, an adjudication, or, in any event, expressed permission to vary from the standards as fixed by the statute (citing *Becker v. Jones* [Wis.] 157 N. W. 789; *State v. Police Commissioners*, 14 Mo. App. 297; *Atlantic & P. R. Co. v. United States*, 76 Fed. 186; *State v. Board of Education*, 35 Ohio St. 368; *New Jersey R. & T. Co. v. Suydam*, 17 N. J. L. 25). It is

unnecessary to review and discuss these cases, because, as said, the mine inspector himself testified that he had not determined the matter as contended by appellant. We think the trial court properly instructed that, under the undisputed evidence, the mine inspector had not made such determination, and that, outside of the statement that the evidence is undisputed, the instruction is correct, under the statute and the law.

But it is thought by appellant that such determination might be found by the jury from the words and actions, or failure of the mine inspector to speak and object at times

2. MASTER AND SERVANT: width of haul-
ageways; de-
termination by
inspector.

he inspected the entry in controversy, prior to the accident, and that it was a question for the jury to say whether the inspector had made such determination. Defendant

offered instructions on this theory, and that it was the duty of the mine inspector to see to it that the entries were of the proper width. It may be said in passing that, conceding that such was the duty of the inspector, there was also a duty resting upon the defendant, and further, that there is no claim, and it could not well be made, that the inspector could make any determination that the entries should be so narrow as not to permit cars to pass. There was some evidence admitted on this subject, without objection, but in a negative form. For instance, the mine inspector, Mr. Holland, testified that he does not remember stating to defendant company that its entries could be maintained at the width of eight feet; does not remember saying verbally to defendant's mine foreman, Mr. Hunter, or his superiors, that it was practicable for them to maintain their skip entries eight feet wide; never made any complaint to them that their entries were not wide enough. The court, however, excluded much of the offered testimony by which defendant sought to show by its foreman, Hunter, that he went

through the mine and this entry, so far as it had been driven, with the mine inspector, the first time the inspector went through the mine, and called the inspector's attention to the narrowness of the entry, and that the inspector said it had squeezed in, and that it couldn't be helped, in the long-wall system. We are of opinion that this falls short of a definite ascertainment or determination that it was impracticable, at the time plaintiff was hurt, or at any time, to provide entries of the required width.

2. It is thought by appellant, and assigned as error, that the court did not strike out, on defendant's motion, a statement by the mine inspector that, if he had made a determination such as that now in question,

3. WITNESSES:
cross-examina-
tion: explana-
tion of what
witness means.

"it would have been made in writing, and filed away in the State House with my report." The only objection to the answer was that it was incompetent; but this evidence came on recross-examination, after witness had been interrogated on direct, cross, and redirect examination, as to what he had observed and done, and what he meant by the word "determine." It appears that the witness had not understood some of the questions, and counsel, perhaps, did not understand the witness. A part of the record on this follows:

"Q. In answer to a question to me, you started to say, and did say, 'if there had been a determination,—' and objection was made that it was not responsive to the question I had asked. You may go on and say what you were going to say, when you started by saying 'if there had been a determination.' (Same objection.—Overruled. Defendant excepts. Further objection that it cannot be a competent answer with that start, and not calling for a statement of fact. The court: 'You didn't give him a very good opportunity to say.' Defendant excepts.) A. If there had been a determination of that kind made by either me or any

other inspector. (Defendant moves to strike that out. Sustained. Plaintiff excepts.) A. By me, then, it would have been made in writing and filed away in the State House with my report. (Defendant moves to strike that out as incompetent. Overruled. Defendant excepts.) When I make a determination of that kind, I put it in writing."

There seems to have been no objection to the last question and answer. Thereupon, counsel for appellant further examined the witness, on redirect examination, as follows:

"Q. I understand you, then. Don't you, when you visit a mine, when you look over it and find something out of the way, don't you make suggestions verbally to one of the management, either the pit boss or the operator? A. Most of them are made in writing. Q. Some of your recommendation, you say, you do not make in writing? A. Some that are of no consequence or of little consequence."

The answer objected to was no more than the witness' saying what his practice was; and, under the circumstances, we think there was no error.

3. It is thought that the court erred in not permitting counsel for defendant to ask leading questions of his witness Holland, the mine inspector, for that the witness was unfriendly to the defendant, or to defendant's counsel. There is nothing in the examination of the witness in chief to indicate any antagonism; but, on some of the redirect examinations, witness seems to have taken offense at some of the questions propounded by defendant's counsel, and at the attempt to require witness to answer yes or no, and so on. But few objections were made because the questions were leading, and we think it was a matter within the discretion of the trial court.

4. Several errors are assigned in regard to evidence of subsequent repairs, and the taking down of a part of the cap rock after plaintiff was hurt. These have reference to

4. NEGLIGENCE:
evidence: re-
pairs subse-
quent to in-
jury..

the evidence and to an instruction by the court. It was in connection with evidence as to certain measurements as to width and dates. It is not disputed by appellee that, ordinarily, such evidence is not competent. But the situation in the instant case is not the same as in *See v. Wabash R. Co.*, 123 Iowa 443, 447, and other cases cited by-appellant. In this case, defendant introduced evidence tending to show that the rock had been shot down, and that the haulageway was wide enough to permit cars to pass through, both before and after the injury. There was also evidence on the part of appellant that the rocks did not need to be taken down; and further, defendant introduced evidence tending to show that the rock could not be taken down. It was claimed by appellant that there was no change of conditions. It was further claimed by appellant that its foreman made measurements at the place where the injury occurred. It was competent, therefore, for plaintiff to show that the roof was taken down, and could be taken down; that there had been a change of conditions which would permit the cars to pass through safely, because of the changed conditions. And it was competent for appellee to introduce evidence tending to show the change of conditions at the time the measurements were made. *Beck v. Beck Coal & Min. Co.*, 180 Iowa 1, 19. The court instructed on this feature of the case as follows:

"14. Evidence has been admitted tending to show that some of the cap rock was taken down from the entry where plaintiff claims to have been injured, after the date of said injury. This evidence was drawn out when a witness was being examined as to what parties had taken down said cap rock and when it was taken down. The fact that the entry was repaired after the accident is not competent evidence that the entry was out of repair will not be considered by the jury for that purpose. It is competent evidence, how-

ever, as to when and who in fact took down the rock, and whether it was taken down before or after measurements were made by the mine foreman."

We think there was no error in regard to this.

5. It is thought to be erroneous that counsel for plaintiff referred to the matter just mentioned in argument, and said that taking down the rock alone ought to convince the jury that the company knew the place was dangerous; but this was in connection with the argument as to whether it

5. TRIAL:
permissible
argument.

was taken down before or after, and that defendant claimed it was before the injury. Counsel further said:

"And then we hear the claim that, in addition to that, Lew Meyers went and took down this rock before this accident. 8 or 9 days—that was the claim. It was not fixed by Lew Meyers at all before the accident. The only time he ever went there was the second day after Butkovitch was hurt, the next day being an idle day."

Counsel further said, in the same connection:

"If he [Hunter, the foreman] knew before that it was dangerous or was not, why was he asking John Butkovitch to go there and take the rock down, in response to John's complaint that the place was too low or too narrow? If he knew it was all right, why didn't he say, 'The cars go through all right. It isn't dangerous.' But instead of that, he admitted by his conduct that the place was too low, was too narrow; that he was maintaining a place that was not safe, and wanted somebody to fix it. But he got too careless, and somebody got hurt, and he is here now, trying to throw the responsibility on Buell and Radovich or the plaintiff."

Under the record, we think this was not unwarranted argument, and that it was not prejudicial.

6. As to the alleged estoppel pleaded by appellant.

which appellee contends is but another way to attempt to apply the doctrines of assumption of risk and contributory negligence, it is true that the mine

6. MASTER AND
SERVANT:
Workmen's
Compensation
Act: rejection:
assumption of
risk and
negligence.

foreman testified, as the defendant had pleaded, that plaintiff was sent to fix the entry in question before he was injured, and that plaintiff told the foreman that he had taken down the rock, and that it was

all right. But this was denied by plaintiff. It seems to us that the bearing of this evidence would be on the question of assumption of risk, and possibly contributory negligence, in that it is claimed that plaintiff knew of the conditions, and continued to work after complaint by him. It appears without conflict that plaintiff was an employee of the defendant company, and that he sustained an injury arising out of and in the course of his employment. The defendant had rejected the provisions of the Compensation Law, and was under obligation to pay compensation for negligence as at common law, as modified by the statute. The Compensation Act, Section 2477-m (c), Code Supplement, 1913, provides, in substance, that the company shall not escape liability on the ground that the employee assumed the risk, or that he was negligent, unless negligence was willful, and with intent to cause the injury, and so on; and further, that it shall be presumed that the injury to the employee was the direct result and growing out of the negligence of the employer, and that such negligence was the proximate cause of the injury; and places the burden of proof on the employer to rebut such presumption. It was alleged in the pleadings that defendant was not within the Compensation Law, and the court properly instructed in reference thereto, and in harmony with the law. The court instructed, among other things:

"9. The two propositions of negligence or freedom from negligence upon the part of the defendant company to

which the evidence in this case has been directed are: First, Did the defendant, at the place where plaintiff claims to have been injured, maintain its entry of the width provided by the laws of this state? and, second, Did the defendant, at the place where plaintiff claims to have been injured, use ordinary care to provide the plaintiff a reasonably safe place in which to do his work? If the defendant has failed to prove, by the preponderance or greater weight of the evidence in the case, that it was free from negligence in both the particulars stated, and which was the proximate cause of plaintiff's injury, then the plaintiff will be entitled to a verdict at your hands. If the defendant has proven, by the preponderance or greater weight of the evidence in the case, that it was free from negligence in both particulars stated, or that such negligence, if not disproved, was not the proximate cause of plaintiff's injury, then the defendant will be entitled to a verdict at your hands."

He later stated the law in more elaboration, as to the two points, and then said, in part:

"13. If the defendant has proven, by the preponderance or greater weight of the evidence in the case, that it was free from negligence which was the proximate cause of the plaintiff's injury, then you need consider the case no further, but return your verdict for the defendant."

We think the instructions of the court cover all points, and all that defendant was entitled to. There was evidence of negligence, as well as the presumption of negligence, and it was for the jury to say whether defendant had overcome the presumption. There was no evidence that plaintiff was intoxicated, or that he was guilty of willful negligence. It should have been said before that, at the close of plaintiff's evidence, and again at the close of all the evidence, defendant moved for a directed verdict. The motion was properly overruled.

Other minor matters are argued, but such as seem to be controlling have been discussed. Upon a consideration of the entire record, we reach the conclusion that there was no prejudicial error in the trial of the case, and the judgment is, therefore,—*Affirmed*.

WEAVER, C. J., EVANS and SALINGER, JJ., concur.

CITY OF DUBUQUE, Appellee, v. DUBUQUE ELECTRIC COMPANY, Appellant.

FRANCHISES: Strict Construction. A franchise to construct a 1 street railway and necessary side tracks, turnouts, and switches "on South Dodge Street from Grandview Avenue" will not authorize *any* construction on Grandview Avenue, and especially will not authorize the construction of a "loop."

WORDS AND PHRASES: "From." "From" held to exclude the 2 terminus referred to.

Appeal from Dubuque District Court.—J. W. KINTZINGER, Judge.

MAY 4, 1920.

ACTION in equity, asking an injunction against defendant. There was a decree entered in October, 1918, for the plaintiff, restraining defendant from operating its street cars over and upon the loop, as laid and constructed, upon Grandview Avenue, and enjoining defendant from using said loop as a part of its street car lines. There was a judgment against defendant for costs. The defendant appeals.—*Affirmed*.

Nelson, Duffy & Nelson, for appellant.

M. H. Cziziek and *M. D. Cooney*, for appellee.

PRESTON, J.—The petition was filed August 18, 1915,

and against the Union Electric Company, a corporation, organized under the laws of Iowa. Defendant, Dubuque Electric Company, a Delaware corporation,

1. **FRANCHISES:** in July, 1916, purchased and took over the
strict con-
struction. street car system of the Union Electric Company.

It is alleged substantially that plaintiff is a special charter municipal corporation; that, in 1902, the Union Electric Company was granted a franchise to operate its various lines of street railway upon certain designated streets for street railway purposes; and that, according to the terms of said franchise, said company is limited to the streets therein named; that a copy of the ordinance or franchise is attached to the petition; that Grandview Avenue is a public street, open for traffic, and is not one of the streets which said company was granted any right or franchise to use; that, on November 15, 1914, defendant's predecessor, through its general manager, petitioned the mayor for the right to construct a loop at the terminus of its South Dodge and Linwood line, as an extension to said line of railway, to be constructed from the end or terminus of said line on South Dodge Street, upon Grandview Avenue, and to occupy the street between the curbs on said avenue with the necessary ties, rails, wire, and poles; that said petition was, by motion, referred to the city council's committee of the whole, which committee reported in favor of granting said petition, and which report was approved by the city council; that the Union Electric Company, acting upon such proceedings, tore up the surface of the street, laid its track, and constructed said loop as an extension of its street car line; that said loop is now being used by defendant as a part of its South Dodge Street and Linwood line; that no ordinance was ever passed by the city council, granting defendant the right to occupy Grandview Avenue with said loop, but the only action taken by the council was

the passage of the motion referred to, nor did the mayor issue a written permit to occupy said street; that no notice of the application to construct and extend its line in the form of a loop on said avenue was ever published officially in any newspaper; that the construction and operation of said loop and its appurtenances, and the extension of defendant's system over and along Grandview Avenue is unlawful, and wholly without right or authority; and that, by reason of its location, construction, and operation, it constitutes a nuisance, is a trespass, is a menace to the public, and is an unlawful interference with plaintiff's rights in and to the free and unobstructed use of Grandview Avenue; that, soon after defendant began to construct said loop, and before it was completed, plaintiff served notice upon the defendant to discontinue the construction, and remove its rails, etc., which defendant refused to do, and has ever since continued to operate its line of railway upon said street; that plaintiff has no speedy or adequate remedy at law.

Defendant makes the following admissions: It is the successor to the Union Electric Company, and acquired all the rights of said company, and assumed the obligations of said company, and its predecessor was granted a franchise, as alleged. Grandview Avenue is a public street. Permission was requested to construct a loop, and this was referred to the committee, and granted by the council. It also avers that, before the report of the committee of the whole to the council, the members of the council, in a body, went to the proposed site of the loop, and had the radius and the space pointed out to them; and that said loop is constructed partly on Grandview Avenue and partly on South Dodge Street, at the junction of said avenue and street, with a radius of about 40 feet; that it constructed the loop under the proceedings referred to; and that after laying its rails, it paved the space between the rails and a

foot on either side with brick, and set one pole for its wires used on the loop. It admits that no notice of the application of defendant to receive a franchise, or to grant to it the privilege to construct and extend its line of railway in the form of a loop on Grandview Avenue, was ever published the required number of times, as by law provided; admits that no ordinance was passed by the council, granting the right to occupy Grandview Avenue with the loop, as an extension of its system, and that the only formal action taken by the council was the passage of the motion referred to; and that the mayor did not issue a written permit to occupy the street. It avers that the installation of the loop is not an extension of its railway system, and that no part of said railway is laid upon Grandview Avenue as a street railway system, and that the loop is but an enlargement of the facilities which the franchise holder employs, in exercising the power originally granted; avers that the application to the mayor was not an application for a franchise to operate upon Grandview Avenue, but that the privilege asked for and granted by the council was in the nature of a switch or turnout, to enable the company greater facilities to operate its cars under its franchise; denies that the construction and operation of the loop are unlawful; denies that it was served with notice shortly after beginning the construction of the loop; but avers that, shortly before the loop was completed, it was notified to cease its operation, which notice was not heeded; avers that it will continue to operate the loop, unless denied the right to do so; denies that plaintiff has not a speedy remedy at law; avers that defendant relied, in good faith, upon the permission granted, and expended money for labor and material, which has not been repaid; denies all allegations not admitted.

The case was tried upon an agreed statement of facts, and an amendment thereto, which follow:

"1. It is agreed that the defendant Dubuque Electric Company is the successor of the defendant Union Electric Company; has acquired all the property, rights, privileges, franchises, etc., of the said Union Electric Company in the city of Dubuque, Iowa, and has assumed the duties, obligations, and responsibilities of the defendant Union Electric Company, and is engaged in the management, operation, and control of the properties described in plaintiff's petition, with the same rights and obligations as the defendant Union Electric Company.

"2. It is admitted that the defendant Dubuque Electric Company is limited in the operation of its railway system to the streets named in its franchises, excepting as to rights acquired by necessary implication, including such rights, if any, as were granted by the adoption of the report of the committee of the whole on March 4, 1915, referred to in the pleadings.

"It is admitted that the defendant Dubuque Electric Company has no franchise to lay its tracks or ties or rails on Grandview Avenue, as a part of its street railway system, excepting such rights as may be conveyed in the general grant to install switches, turnouts, etc., and as contained, if any, in the grant of March 4, 1915, by the adoption of the report of the committee of the whole, referred to in the pleadings, and such as were acquired by necessary implication.

"4. It is admitted that, on or about November 15, 1914, the defendant Union Electric Company petitioned the city council of the plaintiff city for the privilege to construct, among other things, a loop at the terminus of its South Dodge Street line of the character and dimensions as shown on blue print map prepared by Eugene Anderson, Civil Engineer, on file in this case, and which is marked Exhibit D.

"5. It is admitted that, before the report of the com-

mittee of the whole, referred to in the pleadings in this case, was made to the city council of the city of Dubuque, all of the members of the city council of the city of Dubuque, while acting as a committee of the whole, and in a body, accompanied a representative of the said Union Electric Company to the proposed site of the loop, and made a personal examination on the ground of the location of said loop, had the radius of the same pointed out to them, and that said loop is constructed partly on Grandview Avenue and partly on South Dodge Street, at the junction of Grandview and South Dodge Street, of a radius of about forty (40) feet.

"6. It is admitted that the defendant Union Electric Company, acting under the authority of the city council of the city of Dubuque, granted under the adoption of the said report of the committee of the whole, went upon the premises pointed out to the members of the city council, and constructed said loop in conformity with the draft shown upon the blue print map marked Exhibit D, hereinbefore referred to, and paved the space occupied between its rails, and one foot on either side thereof, with brick, rendering the whole surface, including the rails, even with the surface of the street, and that it set but one pole to accommodate its wires for the conduct of its cars about said loop.

"7. It is admitted that the only extension granted to and accepted by the defendant Union Electric Company is as is shown on the said blue print map, marked Exhibit D.

"8. It is admitted that the rails used in the construction of said loop were manufactured under a special order, and were on the ground before the work was commenced; that the work of the installation of the loop was begun on July 15, 1915, and completed on August 25, 1915; that the city of Dubuque notified the said defendant Union Electric Company, on August 16, 1915, to discontinue the installation of said loop; that, at the time of the service of this notice, all the work on said loop had been completed, except

the laying and placing of the rails, and the filling and paving of the street, at an outlay for labor and materials of approximately the sum of eighteen hundred (\$1,800) dollars."

"In compliance with the suggestion of the trial court, the agreed statements of facts hereinbefore filed is herein enlarged, or made more definite and specific:

"1. It is agreed that the ordinance which is attached to the petition, and referred to in Paragraph 2 of the original stipulation, is substantially the franchise of the company.

"Paragraph 5 of the stipulation is made more specific in the following particular, to wit:

"The report of the committee of the whole of the city council of the city of Dubuque, referred to in said Paragraph 5, is as follows:

"Your committee of the whole, to whom was referred the petition of the Union Electric Company, asking permission to construct a "Y" at the end of the Linwood line on Davis Avenue, and a loop at the end of the Dodge Street line, would respectfully recommend that the prayer of the petition be granted, and that the space occupied by the track and one foot outside the rails be paved with brick.

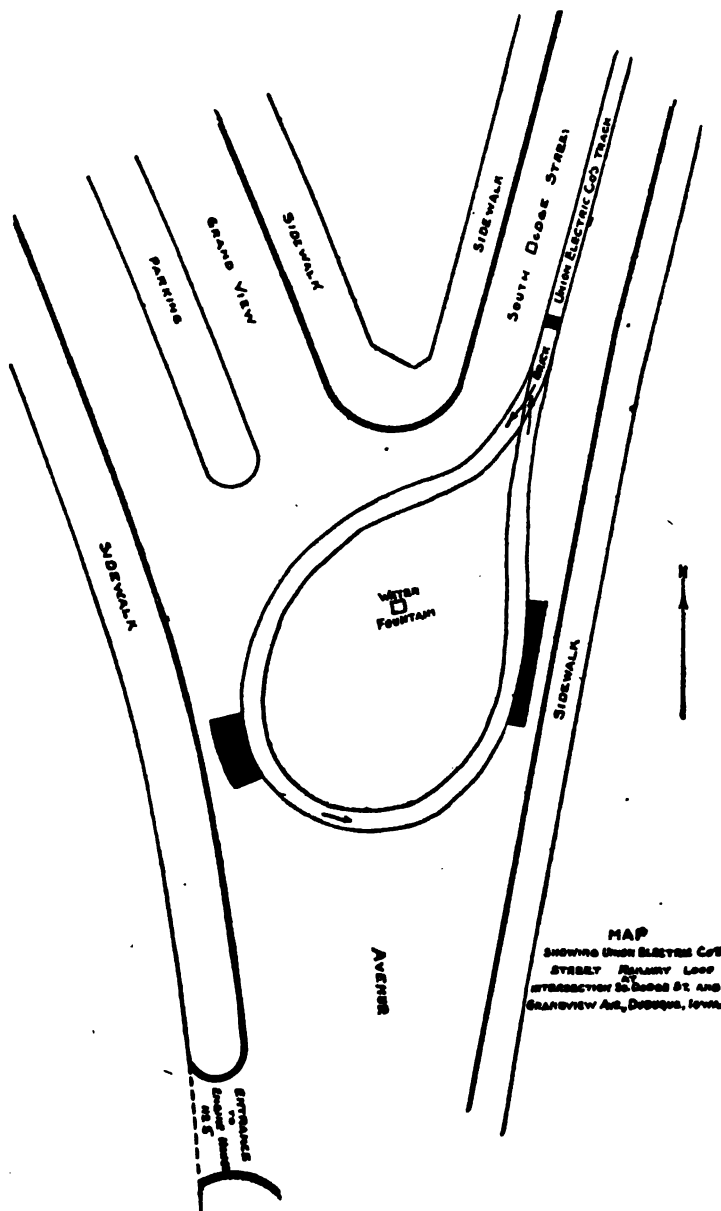
"William Singrin, Chairman.

"On motion of Alderman Singrin, the various reports of the committee of the whole were adopted."

"The extension referred to in Paragraph 7 of the stipulation, if there be any extension, was created by the adoption, upon motion of Alderman Singrin, as above shown, by the city council of the city of Dubuque, of the report of the committee of the whole of said city, hereinabove set out. The plat referred to in the stipulation of facts, as now amended, shows the distance between the rails and the curbs on the east and west side of Grandview Avenue."

It would be difficult to give a good idea of the situation

by any description, hence the blue print plat, Exhibit D, is here set out:



The request for permission to construct the loop is as follows:

"To the Honorable the Mayor,

"Dubuque, Iowa.

"Dear Sir:

"Permission is hereby requested to construct a loop at the end of the Dodge Street line and a 'Y' at the end of the Linwood line on Davis Avenue. This is to permit the operation of single end cars, that we can equip with air brakes, and it will facilitate the movement of cars on this division and, we hope, enable us to work out a plan that will result in the restoration of ten minute service. We request permission to do the above under direction and subject to approval of the city engineer.

"Yours respectfully,

"Union Electric Co.,

"E. M. Walker, G. M."

This request seems not to have been acted upon until March, 1915, when the council adopted the report of the committee. The original franchise or ordinance, under which the defendant claims a right to use Grandview Avenue, contains, among other things, the following:

"Sec. 1. That there is hereby granted to the Union Electric Co., a corporation organized under the laws of Iowa, its successors and assigns, the right and authority to maintain and operate, upon and along the streets of the city of Dubuque, all the lines of street railway, as at present constructed thereon and operated by the said Union Electric Co., under franchises and ordinances heretofore granted by the city of Dubuque to the Dubuque Street Railway Co.. to William L. Allen and Thos. O. Sweeney, to David H. Ogden, and their successors and assigns, and to said Union Electric Co., upon the conditions and under the restrictions set forth in this ordinance, for the period of twenty-five

years from the adoption hereof, and its acceptance by the company.

"The lines of street railway so constructed and operated and hereby authorized to be operated and maintained being more particularly described and located as follows: [Here the ordinance names various streets other than those in controversy, upon which street cars may be operated]; and a line of single track railway on South Dodge Street from Grandview Avenue to Dodge Street, thence on Dodge Street to South Locust Street.

"Sec. 3. For the purpose of constructing, maintaining, and operating said street railway lines, said Union Electric Co., its successors and assigns, shall have the right and authority to go upon said streets and parts of streets and make such excavations therein as may be necessary for the construction, completion, operation, and maintenance of said lines, * * * and to construct all necessary side tracks, turnouts, and switches, and to erect, construct, and maintain such overhead wires and poles, * * * provided that, before commencing any such construction or repairs, said Union Electric Co., its successors and assigns, shall, in writing, apply to the mayor of the city, stating the nature of such work, the time and place where the same is proposed to be done, and thereupon said mayor shall, if satisfied that such work may properly be proceeded with, issue a written permit, authorizing said Union Electric Co., its successors and assigns, to begin and complete such work."

The other additional action of the council is that under the petition to the mayor, of November 15th, as set out in Paragraphs 4, 5, and 6, of the agreed statement of facts, and Paragraph 1 of the amended statement. It is conceded that a part of the loop in question is in Grandview Avenue, and Grandview Avenue is not one of the streets named in the original franchise or ordinance. The franchise ordinance does not merely describe the various lines of railway

and the streets over which they are to be operated, but, by Section 1, before set out, limits the company, in its operation of its system, to those lines and those streets upon which the tracks were then laid.

As we understand it, the Dodge Street line ended where South Dodge Street intersects, but does not cross, Grandview Avenue, and that was its condition at the time the franchise was granted, and also at the time the company asked permission to construct the loop upon Grandview Avenue.

1. It is plaintiff's contention that all grants or franchises for the use of streets must be strictly construed, and, in case of doubt, the grant must be resolved against the grantee; and second, that no grant or franchise to use the city streets by a public service corporation can be given, without following the provisions of the statute with reference thereto. It summarizes its position in this way: That the franchise of the company defines its rights and privileges in the city streets; that the company acquired no rights in Grandview Avenue by the action of the city council in November, 1914, and such action was wholly void, and covered no rights, because it ignored express statutory provisions; that appellant is charged with knowledge of the limitation upon the city's powers, and equity will afford it no relief; that, the action being invalid, there can be no estoppel; that said loop is a nuisance, because it obstructs the free use of the street. Appellee contends, and supports the proposition by citation of authorities, that one who asserts private rights in public property, under grants of this character, must come prepared to show that they have been conferred in plain terms, for nothing passes by the grant, except it be clearly stated or necessarily implied; and that it is a matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to legislative bodies, with a view of obtaining the

most liberal grant of privileges which they are willing to give; that this is one among many reasons why they are to be strictly construed. *Blair v. City of Chicago*, 201 U. S. 400 (50 L. Ed. 801); *State v. Des Moines City R. Co.*, 159 Iowa 259; Cooley on Constitutional Limitations (7th Ed.) 565. Appellant concedes the foregoing to be the rule, but contends that the original ordinance or franchise, granting rights to it upon Dodge Street, includes, by necessary implication, the right to construct a loop extending from the end of Dodge Street onto and over Grandview Avenue. We understand it to claim under the original franchise, and not under the action of the city council, in 1915, for they say in argument:

"This grant did not constitute a new franchise, or did not enlarge the franchise under which the street car company was operating, but was a grant warranted under the terms of the old franchise, and is not a license that the city may revoke at its pleasure."

We assume that they claim under both, in the sense that they claim the right under the original franchise by necessary implication and permission granted by the last action of the council, under the provision relating thereto in the original franchise. This might be so, if the original franchise granted the right to occupy Grandview Avenue, and it may be so if the right is necessarily implied therein. Whether the right is so implied, depends upon the construction of the ordinance or franchise, and the intent of the council, as gathered from the ordinance, and what was in the contemplation of the parties. The franchise does not, in express terms, grant the right to construct a loop. It does give the right to construct necessary side tracks, turn-outs, and switches. It is thought by appellant that these terms cover and are equivalent to the word "loop." The word "loop" could have been used in the ordinance, had it been within the intention of the parties. We know, without

evidence, what side tracks, turnouts, and switches are, and that they occupy less space in a street, and would constitute less obstruction than a loop. The loop in question, according to the blue print, comes to within 8 feet and a few inches of the curb on either side. This would form an obstruction, to some extent at least, and more than a switch, side track, or turnout, for automobiles or other vehicles standing near the sidewalk, and the passage of vehicles along the street. The ordinance provides for the construction of its railway on South Dodge Street, from Grandview Avenue. It also provides that defendant shall have the right and authority to go upon said streets and parts of streets (that is, those named in the ordinance), to construct all necessary side tracks, turnouts, and switches. Construing the words "on" and "from," as used in the ordinance, does it give the company the right to go upon Grandview Avenue, or is it limited to the use of the other street?

It has been held that, by the general rule, "from" an object excludes the terminus referred to; but the rule seems not to be universal. The meaning is to be determined by a

fair and reasonable construction of the whole instrument, regard being had to the true intent of the parties, as expressed therein. 20 Cyc. 850; 5 Cyc. 869; 9 Corpus

2. WORDS AND PHRASES: "from."

Juris 153; *State v. Bushey*, 84 Me. 459 (24 Atl. 940); *Wells v. Jackson Iron Mfg. Co.*, 48 N. H. 491; *Jackson v. Reeves*, 3 Caines (N. Y.) 293. Appellant contends that the words "from," "to," and "at," are to be taken inclusively, according to the subject-matter, and that authority given by a charter or grant to construct and operate a railroad from one place to another confers authority to commence the road at some point within the first place, and end it at some point within the second. They cite *Union Pacific R. Co. v. Hall*, 91 U. S. 343; *Smith v. Helmer*, 7 Barb. (N. Y.) 416; *Tennessee & A. R. Co. v. Adams*, 40 Tenn. 596; *Pitts-*

burg v. Cluley, 74 Pa. St. 259; *Commonwealth v. Erie & N. E. R. Co.*, 27 Pa. St. 339 (67 Am. Dec. 471); *McCartney v. Chicago & E. R. Co.*, 112 Ill. 611; *Houghton County St. R. Co. v. Common Council*, 135 Mich. 614 (98 N. W. 393); *Chicago & N. W. R. Co. v. Chicago & E. R. Co.*, 112 Ill. 589. But these are cases, for the most part, if not entirely, where a railroad is built from one city to another. Appellant quotes from *Chicago & N. W. R. Co. v. Chicago & E. R. Co.*, 112 Ill. 589, *supra*, where the legislature granted the right to locate a railroad "from the city of Chicago to any point in the town of Evanston." It will be noted that the grant provided that it could be to any point in the town. Under this, it could hardly be properly contended that it was exclusive. Interpreting this clause, the court said:

"We think a legislative grant to build and operate a railway from Chicago to another given point, without any express or implied restrictions, would authorize the grantee, so far as the state is concerned, to locate its tracks and fix its terminus at any point in the city."

This seems to hold that it is so, so far as the state is concerned, rather than the city. In *McCartney v. Chicago & E. R. Co.*, 112 Ill. 611, 626, a case involving the same grant and the same phrase, the court said:

"The words 'from' and 'to' a place have frequently, in the charter of a company, been construed to mean from and to a point within the place from and to which the corporation was authorized to construct its road, and especially where there is found in the body of the act anything indicating that intention. *Moses v. Railroad Co.*, 21 Ill. 516; *Farmers' Turnpike Co. v. Coventry*, 10 J. R. 389; *Mohawk Bridge Co. v. Railroad Company*, 6 Paige 554; *Mason v. Railroad Company*, 35 Barb. 373; *Western Pennsylvania Railroad Co.'s Appeal*, 99 Pa. St. 155. This is the reasonable interpretation which, we think, should be adopted in this case; as required by the public object of the grant, in

the accommodation of the public with railroad facilities."

In the case last cited, such interpretation was based, in part at least, upon the public object of the grant, in the accommodation of the public with railroad facilities. This, we assume, is because a railroad coming to a large city, or any city, should, for the convenience of the public, be not required to build its terminals or station outside the city limits. We think that rule and the reason for the rule would not apply in the instant case, where the city itself, under a franchise, grants the right, and limits it to particular streets. As said, there is nothing in any part of the ordinance giving defendant the right to go on Grandview Avenue. We are of opinion that the company is limited to the use of South Dodge Street, from the exterior line of Grandview Avenue, and that, considering the terms of the franchise, and the fact that the company is limited to the use of certain streets named, that a loop is not mentioned therein, the nature of the loop, the greater obstruction and burden upon the street, and all the circumstances, it was not the intention, and was not within the contemplation of the parties, that the company might use Grandview Avenue for a loop. And we think the right is not one of necessary implication. True, it might be more convenient for the defendant to have a loop than a switch, side track, or turnout.

2. We think the discussion so far decides the case, and we shall refer only briefly to the other points suggested. One of these is that, while the council recommended that the prayer of the petition of November 15th should be granted, and the council, by motion, adopted the report, permission was not obtained of the mayor in writing, according to the original franchise. It is contended at this point by appellee that the council could not grant a franchise of this character by a motion; that Section 767 of the Code, and Section 955, Code Supplement, 1913, give cities

under special charter the right to grant rights to construct railroads upon their streets; and that Code Section 766 is made applicable to cities acting under special charter by Section 958, Code Supplement, 1913; and that, therefore, the powers granted in both sections would necessarily come within Chapter 14, Title V, of the Code. They contend, also, that the case of *Merchants' Union Barb Wire Co. v. Chicago, B. & Q. R. Co.*, 70 Iowa 105, holding that, under the facts of that case, a city may grant the right of way on its streets to a railroad company, under Section 464 of the Code of 1873, by resolution, without an ordinance, is distinguished in *Cascaden v. City of Waterloo*, 106 Iowa 673, and *McManus v. Hornaday*, 99 Iowa 507; and, as pointed out in the last two cases, the *Merchants' Union Barb Wire* case did not discuss the proposition of a section like Code Section 947. In the last-named case, there was an ordinance granting the right of way to a part of the street, and thereafter, a resolution permitting the use of the other side. Appellee contends, and cites *Thurston v. Huston*, 123 Iowa 157, 163, *State v. Des Moines City R. Co.*, 135 Iowa 694, *State v. Des Moines City R. Co.*, 159 Iowa 259, and other cases, to the proposition, that, since the statute provides the method to be pursued for the granting of a franchise, its provisions must be followed. They cite the case of *State v. Des Moines City R. Co.*, supra, at page 284, as holding that a company or corporation may operate a street railway upon the streets of a city, under an ordinance or resolution permitting it to do so, without express legislative authority; but that such operation and occupancy would be nothing more than a mere license, terminable at pleasure, and the tracks, etc., would, at all times, be subject to removal as a nuisance, by any citizen especially injured, or by the city or state itself. It is further contended by appellee that, if the last proceedings of the council, by motion, could be considered as an ordinance, still there was never any publica-

tion of notice, as provided by Section 955 of the Code; but, as said, we shall not further consider these propositions, because the first is decisive, and furthermore, as before stated, we do not understand appellant to claim any right under the last action of the council alone.

We are of opinion that the case was rightly decided, and the judgment of the district court is, therefore,—*Affirmed*.

WEAVER, C. J., EVANS AND SALINGER, JJ., CONCUR.

JOSEPH KLADIVO, Appellee, v. ALBERT HOSPODARSKY, Appellant.

LANDLORD AND TENANT: Excessive Levy for Intermingled

1 **Claims—Remedy.** In an action for a *definite* amount of rent, to which is added a claim for a *definite* amount of money loaned, defendant's remedy for an excessive levy under the landlord's attachment is not by motion for a dissolution and discharge of the attachment *in toto*.

MOTIONS: Must Be Ruled On as Presented. Courts must pass on

2 motions as presented—may not so recast an excessive motion as to give to movant that to which he is entitled. So held as to a motion to dissolve an attachment *in toto*, when movant's right was limited to a dissolution of attachment of *part* of the property.

Appeal from Johnson District Court.—R. G. POPHAM, Judge.

MAY 4, 1920.

THIS is an appeal because a motion to discharge the property seized under a landlord's attachment was overruled.—*Affirmed*.

W. J. Baldwin, for appellant.

Rickel & Dennis and Henry G. Walker, for appellee. -

SALINGER, J.—I. The petition upon which the attachment was issued makes claim on notes confessedly due for rent. It adds a distinct claim for money loaned in a stated sum. The motion to discharge asks:

1. LANDLORD AND
TENANT: ex-
cessive levy
for intermingled
claims:
remedy.

"That said attachment be dissolved, set aside and recalled, and that all of the property attached be released from said attachment, and all costs incurred thereunder be taxed to the plaintiff."

The basis of the motion is the claim that the petition shows on its face that:

"The indebtedness sued on is not for rent of the premises described in the petition alone, but includes other items of indebtedness, so blended that it is impossible to say what portion of said property was attached under the landlord's lien, and what portion of said property was attached for the other indebtedness."

No matter how difficult it may be to ascertain exactly how much of the attachment had seized property for the payment of the rent due, and how much for the \$19 borrowed money, it is perfectly clear how much of the claim of the appellant rests upon rent, and how much of it upon money loaned. This situation makes many of the citations relied on by appellant inapplicable. They are cases which cancel the lien and discharge the attachment because plaintiff has "so blended the rent account with other items that it is impossible to separate the one from the other, or if he so confuses them that, when payments are made, it is impossible to say which is paid, the rent or some of the other items." *Smith v. Dayton*, 94 Iowa 102, 107; *Ladner v. Balsley*, 103 Iowa 674, 680; *Erickson v. Smith*, 79 Iowa 374, 377. To like effect is *First Nat. Bank v. Flynn*, 117 Iowa 493, 498. And we find little that is relevant to any material angle of this case in *Kendrick v. Eggleston*, 56 Iowa 128. The exact question, then, is not what shall be done where plaintiff

makes a confusion which is not present in this case. The point to be passed upon is this: Where the petition adds a distinct claim, other than for rent due to a distinct claim for such rent, and thereon more property is attached than would be done if nothing but a claim for rent had been made, should the attachment be dissolved *in toto*? That the tenant might recover damages because the attachment had seized more of his property than was sufficient to secure the payment of the rent may be conceded. Indeed, it has been held that, in such case, he might recover, for one thing, "the value, if anything, of the use of said attached property from the date of said seizure to the present time, together with the depreciation, if any, in the reasonable market value of said property from the date of said seizure to the present time." *Ladner v. Balsley*, 103 Iowa 674, at 679, 680. But appellant did not ask damages because of the over-levy. And the question remains whether the fact that enough property was attached to secure the payment of \$19 borrowed money warrants the canceling of the attachment, thus leaving plaintiff without any security for the payment of his distinctly made and larger claim for rent. It would seem that *Merritt v. Fisher*, 19 Iowa 354, disposes of this question against the appellant. There, there was a reversal because, under facts quite similar to the ones at bar, the court had sustained a motion to dissolve *in toto*, and it was said:

"If a disproportionate and unreasonable amount of property had been attached, and this is clearly made to appear, the excess can be discharged, on motion made for that purpose in the district courts. Courts have power over their writs, to prevent them from being unjustly or oppressively used."

The case of *Ladner v. Balsley*, 103 Iowa 674, 680, in distinguishing the *Merritt* case, in effect approves of it. In a word, whatever rights appellant had because said claim was

added to the claim for rent, it was not the right to have the attachment discharged in its entirety; and that is the only relief which was demanded and denied.

The trial court is not at liberty to reframe the application of the suitor for relief. It must pass upon it as made. It is limited to sustaining the application or denying it.

Mitchell v. Beck, 178 Iowa 786, 813. In

2. MOTIONS: that case, we said:

must be ruled
on as pre-
sented.

"If it be conceded that defendant had the right to have part of the case tried in equity, he did not ask for this; and, as we have before said, the court neither had the power nor the obligation to reframe the motion, or to rule upon what the motion did not present."

We said, in *Sloanaker v. Howerton*, 182 Iowa 487, 491:

"If that were not so, the sole aim of the motion is to have the prayer stricken out *in toto*. Waiving all else, that prayer contained matter which should not be stricken; and, for this reason alone, the motion in this respect was rightly overruled. It was not for the court to reframe the motion. It had to be dealt with as presented, and all that could be done was to either grant it or deny it."

And we concluded that the motion was too broad, and that, therefore, it was right to deny it. To like effect is *Case & Co. v. Illinois Cent. R. Co.*, 184 Iowa 98. And see *Woodbine Bank v. Tyler*, 181 Iowa 1389, 1396; *Bullard v. Beck*, 174 Iowa 349, 355; *Gardner v. Kerlin*, 184 Iowa 793. —*Affirmed*.

WEAVER, C. J., EVANS and PRESTON, JJ., concur.

T. J. QUALLEY, Appellee, v. CITIZENS SAVINGS BANK, Appellant.

FRAUD: Evidence. An allegation of material and false representations of fact necessarily requires the production of proof thereof. Offered testimony reviewed, and held improperly excluded.

EVIDENCE: Parol as Affecting Writings. The rule against varying or contradicting a writing by parol has no application under an issue of damages for fraud in obtaining the writing.

FRAUD: Affirming Contract and Recovering Damages. The victim of a fraud-induced contract may affirm, and recover the resulting damages.

Appeal from Winneshiek District Court.—H. E. TAYLOR, Judge.

MAY 4, 1920.

THE appellant demands a reversal because certain testimony offered by him was excluded.—*Reversed.*

Frank Sayre, for appellant.

• *E. R. Acres* and *R. J. Sullivan*, for appellee.

SALINGER, J.—I. The defendant bank held a mortgage on the lands of plaintiff. It entered into an arrangement with him through which it received a deed to said lands from him. Concurrently with the deed, a contract was made, which, among other things, reserved possession in the grantor for a stated time. The tenant of the grantor paid into the defendant bank \$1,000 rent money. The bank refused to pay this sum to the landlord, this plaintiff, on the ground that he had injured the bank in a sum much larger than \$1,000 by the making of alleged false representations at the time the bank took deed and made contract, and possibly because of alleged breaches of guaranty then made

by plaintiff to the bank. This suit is one to recover said \$1,000. The bank met the petition with an affirmative defense. It must be stated quite fully, in order to determine whether certain testimony offered by appellant was rightly excluded.

II. The affirmative defense is this: The deed and the contract were made at the same time, and delivered together as a part of the same transaction, as an inducement to and as a part of the consideration to defendant. Plaintiff, before the signing and delivering, "made certain oral representations and guaranty to this defendant as to the true measure of indebtedness subsisting at that time" because of a certain life lease and mortgage held by Jule T. Qualley and two mortgages to C. J. Weiser. It is averred that said oral representations and guaranty were, in effect and substance, that all of the incumbrance held by said Qualley "was paid, down to \$2,500; that all of the interest on the Weiser mortgage was paid for the years 1915 and 1916, and plaintiff undertook to pay one half of the interest on the Weiser mortgage for the year 1917 and up to May 1st of that year." Defendant "further avers and explains that, according to such representations and guaranty, it was the intention of these parties that the true consideration assumed to be paid by defendant upon the life lease and the two mortgages was the Qualley life lease and mortgage, which amounted to \$2,500, and that all the interest on the two Weiser mortgages was paid to the first day of May, 1917, and that such was to be the true and full consideration to be paid by defendant upon said terms." It is alleged that defendant "so understood it to be from the said representations and guaranty, and that plaintiff knew defendant so understood the transaction as to the measure and extent of the consideration of the said Qualley and Weiser items." There is an allegation that the statements made "were false and fraudulent, and were known and intended by plaintiff

to be false and fraudulent, for the purpose of misleading, deceiving, and defrauding defendant;" that they did mislead and defraud it; and that the transaction was entered into by appellant in reliance upon these false and fraudulent representations and said guaranty; and that it was thereby injured in a sum greater than any it was owing to plaintiff.

The fair interpretation of this pleading is that the bank was injured by said false and fraudulent representations made to it by plaintiff, and was damaged by a breach of the guaranty made.

III. The defendant offered to prove by its cashier, who conducted the transaction in question, the following: That witness talked with plaintiff about taking over the lands and helping an adjustment of the situation between plaintiff and the bank; that, in this talk, there was discussed the amount of the debts owed by plaintiff on the Qualley farm on account of the Jule T. Qualley life lease and the amount of the two Weiser mortgages; that witness asked plaintiff about the amounts of these claims, "and he explained that he was assuring me as to such amounts as a guaranty, as I told him that I didn't know and could not know, for the bank, as I had control only of the mortgage he had made to the defendant bank, and that I would have to rely upon his representation as to the actual amount of the said debts; and he said I could rely upon his statements as to the amounts actually due and to become due on the said lease and said mortgages, and accordingly, upon that answer to me, that assurance, I did rely upon his representations as to such amounts;" that, while the negotiations were in progress, but before signing and delivering of the papers, plaintiff said to witness and assured him and "worded out to him" that plaintiff understood witness was asking for a direct representation and guaranty that he would "truthfully tell me the amount of said named items;

and plaintiff said further that all the mortgage to Jule Qualley was paid, down to \$2,500, and only \$2,500 remained unpaid thereon; that all the interest on the Weiser mortgage was paid, except that only which would accrue between November 20, 1916, to the month of May, 1917; and that the interest installments accruing on the Weiser mortgages for the two years ending November 20, 1915, and November 20, 1916, were fully paid; and that he would pay that portion of the next following annual installment as it accrued to the 20th of May, 1917, from the previous 20th of November;" and that witness would not have made the adjustment for the bank as it was finally written up in the form of deed and contract, if plaintiff had not stated as he did that he would guarantee the amounts of items on the said incumbrances; further, that the bank had paid \$2,215 on account of said incumbrances over and above what plaintiff had orally represented them to be.

Objections to this offer were sustained, and it is now to be determined whether that ruling was a correct one.

It was objected that all of the offer was incompetent, irrelevant, and immaterial, and that it was not within any issue in this action. The offered testimony is, in substance, that false and fraudulent representations were made as to the amount due on incumbrances upon the land which defendant bought, and that there was a guaranty that the representations were true, and a species of guaranty that plaintiff would see that certain payments of interest were made. This testimony tended to prove, in part at least, the very things pleaded by the defendant. It therefore is neither incompetent, irrelevant, or immaterial, and is clearly within issue joined in the action.

Neither is the objection tenable that the testimony "is calling for conclusions and assumptions." It is a statement of what was said and done.

1. FRAUD:
evidence.

Further objection is that the testimony is an attempt to change, vary, and contradict the terms of a written agreement by parol. Whatever is to be said as to this part of the objection applies equally to the further and only other objection: to wit, that the testimony should not be received because defendant is not repudiating the land purchase transaction. Both these objections would be good if there were no claim of fraud in the case, or if the offered testimony did not tend to prove, or was not a link in the chain of proving, that a fraud was committed. This seems to be realized, because the appellee says:

2. EVIDENCE:
parol as af-
fecting writ-
ings.

"While fraud is charged by defendant, the real contention, and that offered to be shown by McKay's evidence, is that the real contract, as talked and understood between the parties, was not embodied in the writing;" that nothing is really claimed except that defendant misunderstood.

We cannot so read the defense pleaded, nor the testimony offered. Proceeding, then, on the theory that fraud is involved, it is elementary, of course, that oral testimony stating the alleged fraudulent representations is not to be excluded for being a parol variance of a writing. As for the rest, the objection invokes the general rule that one who repudiates must repudiate *in toto* or not at all. The rule is not applicable. Fraud does not do more than give the right of avoiding to the defrauded party. He can waive that and affirm. And though he so retains all that the bargain delivered to him, he may recover damages, in order that he may be placed in the same position that he would have been in had the thing delivered truly been what it was represented to be. He can say to the other party:

3. FRAUD: af-
firming con-
tract and re-
covering
damages.

"You agreed to sell me a farm clear of incumbrances. You falsely and fraudulently told me it was clear. I find it is incumbered. I will keep the farm, but you must pay me

a sum which will enable me to possess what you represented I did have, an unincumbered farm."

We are constrained to hold that the objections made should have been overruled, and, therefore, the judgment below must be—*Reversed*.

WEAVER, C. J., EVANS and PRESTON, JJ., concur.

J. L. CURTIS et al., Appellees, v. FRANK REILLY et al., Appellants.

PARTITION: Necessary Parties. Partition of lands between tenants in common will not be entertained unless *all* persons interested therein are made parties, plaintiffs or defendants. So held where certain members of a dissolved and fully settled partnership sought partition of that part of the property which was separately owned in common by the *partners*, without joining other tenants in common, who were strangers to the partnership.

PARTNERSHIP: Partner's Interest in Lands of Fully Settled Partnership. Partners of a dissolved and fully settled partnership which has lands as a balance of assets, are just as much tenants in common with nonpartnership owners of lands as though there had never been a partnership, and each of the partners and nonpartners had individually bought his respective interest in the property. It follows that there may not be partition of the partner's interests without joining the nonpartnership owners.

PARTITION: Inherently Defective Decree. A decree of partition of the interest of partners in lands, being inherently defective because of failure to bring in other owners of the land, may not be sustained on the after-thought plea that the action was, in substance, a settlement of partnership matters.

Appeal from Chickasaw District Court.—W. J. SPRINGER, Judge.

MAY 11, 1920.

SUIT in equity for the partition of real estate. A devol. 188 1A.—77

murrer to the petition was overruled, and the defendants appeal. The material facts are stated in the opinion.—*Reversed.*

M. E. Geiser, for appellants.

Hurd, Lenehan, Smith & O'Connor, for appellees.

WEAVER, C. J.—The admitted facts in the case are that plaintiffs and defendants were formerly partners in the real estate business. The partnership was dissolved by mutual consent, February 1, 1918, its business

1. PARTITION: settled and debts fully paid, leaving on hand
necessary parties. an undistributed or undivided interest in
real estate, which had been acquired as
follows: During the existence of the partnership, the firm
united with other parties in the joint purchase of four different tracts of land, which, for the sake of brevity, we will designate as Nos. 1, 2, 3, and 4. The purchase of No. 1 was made by the firm and one C. C. Sheakley, who shared in the venture in the proportion of one third to Sheakley and two thirds to the firm, the record or legal title being, for the purpose of convenience, taken in the name of J. L. Curtis, one of the plaintiffs. The purchase of No. 2 was made by the firm and one Spaulding & O'Donnell, in the proportion of one half to the firm and one half to Spaulding & O'Donnell, the record or legal title being taken in the name of Frank Reilly, one of the defendants. The purchase of No. 3 was made by the firm and one Pat Reilly, one Shaffer, and one Thorne, in the proportion of four fifteenths to the firm, one fifteenth to Pat Reilly, and ten fifteenths, or two thirds, to Shaffer and Thorne, the record or legal title being taken in the name of W. G. Shaffer, F. E. Thorne, and Charles Reilly. The purchase of No. 4 was made by the firm and one Tim Donovan, in the proportion of one half to the firm and one half to Donovan, the record or legal title being taken in the name of Donovan and J. L. Curtis.

This action was begun April 3, 1918, by two of the former partners, J. L. Curtis and Peter Neu, naming as defendants only their former partners, Frank Reilly and Charles Reilly.

The petition as originally filed alleged that the plaintiffs and defendants were the joint owners of certain interests in real estate, describing the several tracts, Nos. 1, 2, 3, and 4, and the fractional interests held therein by the parties; also stating the names of the other persons, not parties, owning shares in the land. It further alleged that a partition of the lands in kind was not practicable, and that it could be partitioned only by a sale thereof and a distribution of the proceeds to the parties in proportion to their several shares.

By an amendment, later filed, plaintiffs withdrew the allegation that they "are joint owners of certain interests in real estate," and allege that they are joint owners in equal shares of certain equitable interests in the real estate described in the petition. They also pray for a "decree confirming the shares of the parties in said equitable interests in the real estate, and that partition thereof be made."

The defendants demurred to the petition because it discloses upon its face a defect of necessary parties, in that it is alleged and shown that C. C. Sheakley, Spaulding & O'Donnell, W. G. Shaffer, F. E. Thorne, Pat Reilly, and Tim Donovan are each the owner of an undivided share or part in the lands described, or in some of them, and therefore are necessary parties, and that, until they are brought in, the court cannot properly grant the relief asked.

As further ground of demurrer, it is pointed out that the legal title to the land, or of a part thereof, is shown to be in third persons, who are not made parties.

The trial court overruled the demurrer; and, defendants electing to stand thereon, a decree was entered in plaintiffs' favor, to the effect that plaintiffs and defendants

are together equal joint owners of an undivided two thirds of Tract No. 1, an undivided one half of Tract No. 2, an undivided four fifteenths of Tract No. 3, and an undivided one half of Tract No. 4, and that certain other parties, naming them, not parties to the suit, "own the remainder of the premises, but that the rights of such other parties shall in no wise be affected by this decree."

Upon these findings and conclusions, it was ordered and adjudged that plaintiffs "are entitled to a decree of partition of the undivided interests belonging to them and to the defendants jointly;" and, it appearing that the property is not susceptible of actual partition, a sale was ordered.

I. The issue is purely one of law: Are the plaintiffs, under the conceded facts, entitled to maintain their suit for partition without joining therein, as plaintiffs or defendants, the other persons who are admittedly the owners of undivided shares in the several tracts of land?

The rule is settled beyond all controversy that an action for partition of lands between tenants in common will not be entertained by the courts unless all persons interested therein are impleaded as plaintiffs or defendants. *Barney v. Baltimore City*, 6 Wall. 280 (18 L. Ed. 825); *Parkhill v. Doggett*, 135 Iowa 113; *Miligan v. Poole*, 35 Ind. 64; *Hiles v. Rule*, 121 Mo. 248.

We do not understand appellees to contend that such is not the law, but they deny that this case falls within its terms, because, as they assert, plaintiffs and defendants

are not tenants in common with the other

2. PARTNERSHIP:
partner's in-
terest in lands
of fully settled
partnership.

purchasers, but are the joint holders of an equity only, in which the other purchasers have no part or interest, and such equity may be partitioned without making them

parties. That this involves a misconception of the state of the title and the respective rights and interests of the several

parties therein, we think is quite demonstrable. It is true that, at common law, it was the rule, and is still a recognized principle, that a partnership, as such, not being a person, is incapable of taking and holding title to land. But purchases of land made by a partnership have never been held void. The title so acquired vests, by operation of law, in the partners as tenants in common, with all the usual attributes of an estate of that nature, subject only to an equitable charge for the payment of partnership debts, when other assets of the firm are exhausted. In this case, it is admitted that the partnership has been dissolved; that there are no partnership debts; and that the business of the firm has been fully adjusted and settled. It is also conceded that, whatever may have been the title or interest acquired by the partnership, it is now vested in plaintiffs and defendants in equal shares. If, then, it be true, as we have here suggested, that the conveyance of a fractional interest in these lands to the firm vested the title to such interest in the individual partners, as tenants in common, subject only to an equitable charge for the payment of the firm's debts, it follows of necessity that, when the liability to such equitable charge was removed by the dissolution of the partnership and the payment of its debts, the title to the several tracts of land stood precisely as it would have stood, had the partnership never existed, and the several plaintiffs and defendants in their individual capacity had united with Sheakley and the other third persons in making these purchases. Supporting the rule we here apply, the decisions are numerous.

Borrowing the language of Mr. Freeman:

"The theory sustained by the vast preponderance of the American decisions is that the legal title of the partnership realty is held by the copartners as tenants in common, subject, in equity, to be applied to the payment of the debts of the firm; that, when such debts are paid, all the inci-

dents and qualities of real estate revive; that the trust in favor of the partnership exists only in behalf of partnership objects and liabilities, and, these being fully discharged, the legal title is released from all trusts, and will descend to the heir, as in the case of any other tenancy in common." Freeman's Note to *Greene v. Greene*, 13 Am. Dec. 647.

See, also, Freeman on Cotenancy & Partition, Section 119; *Close v. O'Brien & Co.*, 135 Iowa 305; *Wilcox v. Wilcox*, 13 Allen (Mass.) 252; *Shearer v. Shearer*, 98 Mass. 111; *Baker v. Wheeler & Martin*, 8 Wend. (N. Y.) 505; *Strong v. Lord*, 107 Ill. 25; *Pepper v. Pepper*, 24 Ill. App. 316; and recent annotated case *Kentucky B. C. Coal Co. v. Sewell*, 249 Fed. 840 (1 A. L. R. 556).

In applying this rule, it is also held that, where the conveyance designates the partnership by its firm name as the grantee, parol evidence is admissible to identify the individual partners as the true owners of the title so conveyed. *Walker v. Miller*, 139 N. C. 448 (1 L. R. A. [N. S.] 157).

Speaking of partnership real estate, Mr. Washburn, in his work on Real Property (1st Ed.) Volume 1, page 423, says that:

"Whatever remains of such partnership real estate after the debts of the company shall have been discharged, is held in common, at once subject to dower or curtesy, and goes to the heirs or devisees accordingly."

In short, to repeat in substance what we have already said, the parties, by the several purchases, acquired a tenancy in common in the several tracts of land, each an equal one fourth of two thirds of Tract No. 1; an equal one fourth of one half of No. 2; an equal one fourth of four fifteenths of No. 3; and an equal one fourth of one half of No. 4, subject only to the equity in favor of partnership creditors; and, when that equity was discharged, the legal

title of each to his share, as such tenant in common, became perfect and indisputable; and no partition of such property could be had in an action to which all the co-owners were not made parties. Again we remark that we leave out of the discussion on this branch of the case any consideration of the fact that the title to the land in each instance was taken in the name of one or more of the individual purchasers, for the benefit of all. The fact is conceded, and it is sufficient at this point for us to speak of the title as if it had been judicially determined to be in the beneficial owners. It is, of course, manifest that, with the legal title standing in the trustees, no partition can be ordered, in any event, without bringing them into the case. See *Parkhill v. Doggett*, 135 Iowa 113. This, however, is a complication which can readily be remedied, if further proceedings be had upon remand of the case to the trial court. The mere fact that an undivided fraction of the property was purchased by the joint action of four persons, acting together with one or more other persons, is quite immaterial. All the purchasers are tenants in common of all the land, no matter how small or great be the undivided fractional shares therein, and the joint purchasers of an undivided fractional part cannot maintain an action for partition of their particular fraction between themselves, without making parties of all other tenants in common of the property as a whole. No matter how many persons or combinations of persons unite in making the purchase, or in what fractional parts or proportions they purchase, they still take as tenants in common. Neither acquires superior title or interest in any part or portion of the property. Each has an undivided title and interest, in proportion to his share, in every inch of the land, and no one of them can have his integral part carved out and set apart to him, or sold for his benefit, without in some degree affecting the rights and interests of all the others. That this may not

be done in an action to which all are not parties, is very clear.

In other words, to use the language of the Supreme Court of the United States in *Barney v. Baltimore City*, supra, the interests of all the owners in the subject-matter of such a suit and in the relief sought "are so bound up with that of the other parties that their legal presence as parties to the proceedings is an absolute necessity, without which the court cannot proceed."

In holding that the purchasers of each of the four tracts of land took title thereto as tenants in common, and that all are necessary parties to a judicial partition, we do not wish to be understood as conceding, even by inference, that, if plaintiffs' contentions were to be admitted,—that the interest of the former partners is in the nature of an equity only,—it would entitle any of them to maintain an action between themselves alone for the partition of such equity. In view of the conclusions already expressed, it is unnecessary to enter that field, except as indicated in the following paragraph.

II. Appellees concede that, "after a partnership is dissolved and debts are paid, the firm real estate may be partitioned;" and this the appellants do not deny, if all necessary parties are brought into court. This concession on part of plaintiffs, and their further concession that this partnership is dissolved, its business settled, and its debts paid, would seem to remove the foundation from under their case: but they fend against such conclusion by saying that neither the partnership, nor its former partners owned or now owns any land in common with the third persons named; and that this action is not for the "partition of land itself, but for a division of the equitable estate which belonged to the former copartnership," an estate which, they say, existed in the partnership, from which it passed to the partners, when the firm was dissolved and its debts

paid; and that in this estate no other person or persons has any share or interest. We confess to some difficulty in following counsel's line of reasoning at this point. They speak of the right or rights of the former partners in the land as an "estate" or "equity," distinguishing it in some way from an ownership in common with their fellow purchasers; but they wholly fail to explain, define, or suggest the nature of the estate or equity which they insist may be partitioned by the court without making such copurchasers parties to the proceeding.

Now, an estate in lands is any property, right, or interest therein, and includes every species and kind of title to real property known to the law, from a mere leasehold to a fee simple absolute, and not excepting a tenancy in common; and to say that the partition sought in this case has reference only to an estate in the land, as distinguished from the land itself, gets us nowhere. Nor does the assertion that partition is desired of an "equity" in the land, as distinguished from the property itself, bring us nearer the mark. An equitable title to land exists where the legal title is vested in one person, and the beneficial interest inures to another person,—such a case, in fact, as is illustrated in this record, where the conveyances of the lands purchased were made to one or more of the individual purchasers for the benefit of all.

An "equitable estate" or interest in land is, generally speaking, some definite right or interest in the property such as will furnish ground for equitable relief against a trustee or against any person or persons asserting a hostile right or interest therein. It is, perhaps, evident that the claim at this point is to the effect that the partnership itself never acquired anything but an equity, because it was incapable of taking the legal title; but, as we have already found that land so conveyed does vest in the partners as tenants in common, it is unnecessary to repeat the discus-

sion here. If that conclusion is correct, the attempted distinction between the kind and quality of title acquired in the lands by Sheakley and other purchasers not made parties to the action, and the title acquired by their copurchasers, is not sound.

III. Appellees further say that, in any event, although this is, in form, an action for partition, yet, even if this relief be not available, the proceeding is in equity, and the decree below may be sustained as an exercise

3. PARTITION :
inherently defective decree.

of the equitable powers of the court in winding up a partnership business. This cannot be. To do this is to work an abandonment of the suit brought, and entire disregard of the theory upon which the case was presented and disposed of in the court below. There is no controversy whatever over the partnership business. The firm has been dissolved, its debts paid, and there is left to the partners this land. It is conceded in the pleadings that the plaintiffs and defendants are individually the equal owners of whatever estate or right they acquired in the property. That equal right they acquired, not only by their joinder in the purchase, but by operation of law, following upon their voluntary and amicable settlement of their partnership affairs without the aid of the court, and upon the payment of firm debts, and discharge of all opposing equities. If there subsequently arose controversy over the division of the land, either party had the right to bring suit for partition, and in such action the court was not called upon to settle the business of a partnership already settled and closed. What plaintiffs demanded was partition, a form of action with which the statute forbids the joinder of any other proceeding. It was partition, or attempted partition, which was granted. Such an adjudication involved no partnership accounts or partnership matters in general. The plaintiffs asked no adjudication of the partnership affairs, nor was any such is-

sue tried. The trial court, in its decree, treats the case as one in partition, and ordered partition. It is entirely too late to change the nature of the issues tried and decided.

There is no sound theory of law or equity on which the decree is sustainable.

IV. Our attention is called, in conclusion, to the "legal difficulties" which would have faced the plaintiffs, had they attempted "a complete partition of the land itself."

It is pointed out that, as no two of the four tracts of land in question were bought by the same combination of purchasers, partition of all the tracts could not be had in a simple suit, and plaintiffs would have been driven to bring four several suits to accomplish that end. This is probably true, if the objection be made. *Hunnewell v. Taylor*, 3 Gray (Mass.) 111. It is one of the embarrassments of riches. An ancient monarch is reputed to have expressed great regret that all his enemies did not have a single neck, so that he might behead them at a single stroke. Human life is full of similar perplexities. The established procedure may be inconvenient, but the court cannot, on that account, waive its requirements. Failure to implead necessary parties in partition is a jurisdictional defect. *Parkhill v. Doggett*, *supra*.

For reasons stated, the decree below must be—*Reversed*.

LADD, GAYNOR, and STEVENS, JJ., concur.

FIRST NATIONAL BANK OF ALBIA et al., Appellees, v. WHITE ASH COAL COMPANY et al., Appellees; ROSELAND FUEL COMPANY, Intervener and Appellant.

RECEIVERS: Contracts Extending Beyond Receivership. One who, 1 without the approval of the court, enters into a contract with a receiver for a definite time, with knowledge that the receiver

was contemplating an early closing of the business by a sale, may not hold the trust funds for damages consequent on a breach of the contract because of a sale prior to the expiration of the contract period.

RECEIVERS: Unauthorized Contract—Acquiescence. Creditors who are entitled to the funds derived from a receivership may not be said to have “acquiesced” in an unauthorized contract by the receiver, from the naked fact that they had some indefinite knowledge of such contract.

Appeal from Monroe District Court.—D. M. ANDERSON, Judge.

FEBRUARY 16, 1920.

REHEARING DENIED MAY 11, 1920.

ACTION in equity to foreclose a combined real estate and chattel mortgage on a coal mining property, given to plaintiffs. In connection with the foreclosure, plaintiffs applied for and had appointed a receiver, to take charge of the property pending the foreclosure and sale thereof. The action was begun and the receiver appointed September 29, 1916. Judgment and decree was entered in favor of plaintiffs, December 2d thereafter. The defendant coal company was wholly insolvent, and the property was in a run-down and dilapidated condition. By authority of the court, the receiver borrowed about \$7,000, to put the property in shape so it could be operated until a sale was made. Appellees contend that the property was operated at a loss; and this may be so, as to the first month or so, but thereafter, there was a shortage of coal and an increased demand therefor. As we understand the amended record, the receipts or gross earnings for the entire time of the receivership exceeded the expenditures by about \$50. The gross earnings amounted to nearly \$45,000. But the total receipts and proceeds of the sale are not enough to satisfy the plaintiffs' claims and pay the costs and expenses of the re-

ceivership. There will be a deficit, even if the judgment against intervener is paid. The receiver operated the mine about 2½ months. In December 15, 1916, the property was sold by the receiver, according to the provisions of the decree, and the purchase money paid, and the property turned over to the purchaser. The intervener, which is a nonincorporated concern, owned by W. A. Linton and his wife, and managed by said Linton, was not made a party to the foreclosure proceedings. After the sale of the property on December 15th, to wit, on December 21, 1916, the intervener filed a petition of intervention, claiming damages for the breach of a written contract entered into by the intervener and the receiver, without authority or order from the court, as appellee contends, but with authority, at least implied authority, as intervener says, by which the receiver agreed to furnish certain quantities of coal to intervener to March 31, 1917. Coal was furnished up to the time of the sale of the property, but not all paid for by intervener. The alleged breach of the contract is for the failure to furnish coal thereafter to the end of the contract. The damage claimed by intervener is the difference between the contract price and the market price of coal during the term of the agreement. The petition of intervention claims \$5,000 damages, but intervener claims that the proof shows about \$2,000, or something under that. The receiver filed a cross-petition to the petition of intervention, asking judgment against intervener for coal actually furnished up to the time of the sale, in the sum of \$912.64. It was conceded on the trial by intervener that he was indebted to the receiver in that amount, that being the balance on the itemized statement attached to the receiver's cross-petition. After a full trial, the trial court held that intervener was not entitled to recover on the contract after the sale of the mine, dismissed the petition of intervention, and rendered

judgment against intervener on the receiver's cross-petition. Intervener appeals.—*Affirmed.*

D. W. Bates and Gilmore & Moon, for appellant.

J. C. Mabry, for appellees.

PRESTON, J.—The controversy is over the proposition whether intervener is entitled to damages for a breach of the contract after the sale, which appellees contend would have the effect to compel plaintiffs, having

1. RECEIVERS:
contracts ex-
tending beyond
receivership.

valid liens, to pay such claim; and they claim, too, that it would require the operation of the mine till March 31, 1917, at a loss, for the sole benefit of intervener. Separate answers to the intervention were filed by the receiver and the plaintiffs, in which four or five defenses are set up, but all of which we need not discuss. As we view it, the controlling question is whether the receiver, concededly an officer of the court, had authority, under this record, to make a contract which would be binding and enforceable in the future, and after the sale of the property. Before proceeding to the merits, it may be well to notice one or two further matters.

It is thought by appellant that there is an estoppel as against plaintiffs and the receiver, because, as is claimed, the plaintiffs knew of the contract and its provisions, and acquiesced therein. Appellees concede that

2. RECEIVERS:
unauthorised
contract:
acquiescence.

they knew coal was being furnished intervener, and that there was some arrangement, but they deny that they had any knowledge of the terms of the contract or the time it was to run, and say they never saw the contract or a copy of it, until the trial of the case. On the other hand, a sale of the property was contemplated from the start, and this was known to intervener. Its manager, Linton himself, contemplated a purchase of the property, and aided the receiver

in trying to find a purchaser. Under the authorities, the very purpose of a receivership of a private insolvent corporation is to close up its business and distribute the property or proceeds speedily, and it should not be operated at a loss. There may be other circumstances in the evidence bearing on this point, but we think the record does not show acquiescence or an estoppel, if intervenor had pleaded an estoppel, and even though an estoppel would operate, as against the court, which is questioned by some of the cases.

The orders of the court which have a bearing will be set out. The order appointing the receiver provides:

"That the receiver take immediate charge of all the mining property, equipment, and assets of every kind connected therewith, and preserve the same, and he is hereby authorized to employ such help as may be necessary to preserve and maintain all the said property, and to keep the said mine in reasonably good condition, and to operate the same mine, if, in his judgment, it can be so operated within the income arising from the operation thereof, and the sale and marketing of coal therefrom, and he is authorized to make such contracts for the marketing of coal therefrom as, in his judgment, will produce sufficient income to keep said mine in reasonable condition for operation, and keep the same in operation during such periods of time as, in his judgment, the business thereof will justify, * * * and conduct all said business as, in his judgment, will best preserve and maintain said property in condition to bring the largest price, in case a sale thereof shall be ordered, and all till the further orders of the court or a judge thereof in the premises."

Soon after the appointment of the receiver, he made application to borrow money for repairs and operating expenses, in which he alleged that:

"It is necessary to keep said mine in operation to whatever extent its products can be marketed, in order to keep

the said mine from rapidly deteriorating and diminishing in value. * * * He believes the said mine can be kept in condition to be operated at a profit during the receivership, and in such condition to sell for enough more than in its present condition to justify the expenditures."

The order was granted, and it provides, among other things, that, in order to prevent the property from rapidly deteriorating and decreasing in value, it is necessary to keep the same in operation to whatever extent its products can be readily sold on the market. The court seems to have refused to recognize as binding any contract that would tie up the property, or be an incumbrance on it in the future; for, in the order of sale, it is expressly provided that the property should go to the purchaser "divested of all contracts for the sale of coal made by the receiver, and which shall be held to terminate with the sale of said property by the receiver." The receiver testifies that it was his intention to sell the property as soon as he could find a purchaser at the price the court would authorize him to sell for, and that, because he didn't have the money to make the necessary repairs and extension work, the mine could not have continued to operate through the winter to the first of April; that, if the property had not been sold in December, he would have been compelled to shut the mine down, and there would have been nothing to the mine,—no funds to do anything with. Appellant relies upon the language of the order appointing the receiver, that he is authorized to make such contracts for the marketing of the coal as will, in his judgment, produce sufficient income to keep the mine in operation, etc. But this would not authorize the receiver to make any improvident contracts, or contracts unlimited in number or time, nor does it specifically authorize him to make a contract to April 1, 1917; nor do we think there is any implied authority for the receiver to do so, when the language is considered in connection with other language in

the order, and all the circumstances of the case. The language relied on is limited by other provisions in the same order. For instance, the receiver is to operate the mine if, in his judgment, it can be operated within the income, and again, to operate it for such period of time as, in his judgment, the business will justify, and to conduct the business so as to best preserve and maintain the property in condition to bring the largest price in case of a sale. As said, the receiver testifies that, in his judgment, he could not have longer operated the mine in accordance with his order of appointment.

Code Section 382f provides:

"Subject to control of the court or judge, a receiver has power to bring and defend actions, to take and keep possession of property, to collect debts, to receive the rents and profits of real property, and, generally, to do such acts in respect to the property committed to him as may be authorized by law or ordered by the court."

The receiver stands indifferent, as between the parties, though appointed on the application of one of them, and must prudently preserve and protect the property entrusted to him as an officer of the court. The property is *in custodia legis*, and the receiver acts for the court, as its creature or officer, having no powers save those conferred upon him by its orders, or reasonably to be implied therefrom. He is subject to the court's directions and orders in the discharge of his official duties, and at all times is entitled to apply to the court for instructions. *State Cent. Sav. Bank v. Fanning Ball-Bearing Chain Co.*, 118 Iowa 698; *Bank of Montreal v. Chicago, C. & W. R. Co.*, 48 Iowa 518; 1 Clark on the Law of Receivers (1918 Ed.), Sections 15 and 18.

A business should not be continued under a receivership when it cannot be conducted except at a loss. When it becomes apparent that the business cannot be conducted save at the expense of the estate, and no ulterior benefit is

reasonably to be anticipated, the officer, in the exercise of reasonable prudence in the care of the property entrusted to his keeping, should proceed no further without specific directions. 34 Cyc. 286. The same volume, page 287, reads:

"The courts, however, decline to sanction the exercise of this discretion on the part of receivers in respect to large outlays or contracts extending beyond the receivership and intended to be binding upon the trust."

"Although, as receiver, he may enter into negotiations and make such agreements as would be binding upon him as an individual, yet, in order to affect the funds in his hands, his acts must be ratified by the court. This rule is so well established that it has been decided that all persons contracting with a receiver are chargeable with knowledge of his inability to contract, and enter into contracts with him at their peril, and that the court has unquestioned power to modify or even vacate his agreements." Beach on Receivers (Alderson's Ed.), Section 270.

See, also, High on Receivers (4th Ed.), Section 186; *Chicago Deposit Vault Co. v. McNulta*, 153 U. S. 554 (38 L. Ed. 819).

Appellant relies largely upon the case of *Worthington v. Oak and Highland Park Impr. Co.*, 100 Iowa 39. They also cite *Shreve v. Hankinson*, 34 N. J. Eq. 413; *Weeks v. Weeks*, 106 N. Y. 626 (13 N. E. 96); *Yetzer v. Applegate*, 85 Iowa 121; *Brown v. Winterbottom*, (Ohio) 120 N. E. 292. In the *Worthington* case, some of the discussion might be considered favorable to appellant, but, as to the main points involved, it is readily distinguishable from the instant case. In that case, the court had made an order which provides in part as follows:

"It is further ordered that the said receiver have authority, and he is hereby directed, to continue to operate the said college as an institution of learning, affording like facilities as heretofore, * * * and to make all contracts

for professors, teachers, servants, helpers, and assistants he may find necessary to the successful operation and continuance thereof * * * and also to recognize and adopt any contracts now outstanding made by the said Longwell for the employment of professors for help for the ensuing year, or for printing and advertising for the ensuing year, and for work and labor and supplies for the ensuing year."

Under this order and authority, the receiver employed an instructor for the school year, but, at the expiration of one month, discharged her, and attempted to terminate her contract. She asked damages for breach of the contract, and her claim was sustained. She was discharged only because the department which she was conducting was not self-supporting. The whole college was conducted at a loss, yet it was operated under the receiver for the year for which the instructor had been employed. The order of appointment contemplated that the school should be operated by the receiver during the year. It specifically directed the receiver to employ teachers to operate the college, and authorized the receiver to adopt and recognize any outstanding contracts made by the president for the employment of professors for the ensuing year. The court found that the instructor was employed by the president and by the receiver himself. In that case, it was in contemplation of the court and all parties interested, that the college should not be sold by the receiver, but operated during the ensuing year. The receiver urged that the contract was an imprudent undertaking, and that the receiver had authority to revoke and rescind it, in the interest of the college and creditors, and the court said that, if it had been an ordinary decree in the case of the appointment of a receiver, there would, no doubt, be force in such position. In the respects mentioned, that case differs from the one at bar. Here, the appointment did not authorize the operation of

this coal mine during the ensuing year, or for any definite length of time.

The *Shreve* and *Weeks* cases, *supra*, are similar. There, it was evident from the beginning that the litigation would be pending through a period of years, which fact was submitted to the court, and the court specifically ordered the receiver to make a lease for three years. This was known to and acquiesced in by all parties interested. When the three-year term expired, the litigation was still pending, with the prospect that it would continue for at least another three years; and the court specifically directed the receiver to extend the leases for another three-year period. Contrary to expectations, the litigation terminated before the last three-year period expired, and objection was made to the continuation of the leases to the end of the term. Under such circumstances, it was held that the equities were in favor of the tenants, and should be considered in view of all the conditions. Such is not the situation in the case now before us.

Brown v. Winterbottom, *supra*, was a case of negligence, holding that liability for personal injury, growing out of the operation of property by a receiver, is a part of the expenses and liabilities of the receivership. We think it is not in point on the question being now considered. Nor does the *Yetzer* case apply to such a case as this.

Other and additional matters set up by receiver and plaintiffs in answer to the petition of intervention are that appellant was not entitled to recover because of liens on the property in favor of plaintiffs which had existed for a considerable time before the receiver was appointed, and that the receiver took the property subject to the payment of such prior liens, and that such incumbrances are entitled to protection; also, that the agreement between the receiver and intervener was made with the understanding that the property was for sale, and that, if sold, that would

terminate the agreement; and further, that the intervener was in default in the performance of his part of the contract from the time it was made until the time the property was sold; that the receiver was in need of money to operate the mine; and that the intervener's default hampered the receiver in carrying on the mine; and that, for that reason, the receiver was not bound to continue to furnish coal after the default; and some other matters.

As before stated, we deem it unnecessary to go into these matters in detail. After considering the entire record, we reach the conclusion that the judgment of the district court was right. It is, therefore,—*Affirmed*.

WEAVER, C. J., EVANS and SALINGER, JJ., concur.

FIRST NATIONAL BANK OF HAWKEYE, Appellee, v. S. S. PATTERSON, Appellant.

TRIAL: Reception of Evidence—Admissions Contradictory of Defense. An admission by a defendant contradictory of his pleaded defense may very properly be considered in weighing the truthfulness of his defense, and the court may instruct accordingly.

BILLS AND NOTES: Alteration—Failure to Explain. Defendant in an action on a promissory note has no right to a sweeping instruction to the effect that plaintiff's failure to explain an alteration, irrespective of its nature, raises a presumption which vitiates the note.

TRIAL: Inapplicable Instructions. Instructions on a theory without support in the evidence are properly refused. So held on the issue of alteration in a promissory note.

Appeal from Fayette District Court.—W. J. SPRINGER, Judge.

MAY 11, 1920.

ACTION on two promissory notes, given as a combination paper. The opinion states the facts, and the defenses urged. Judgment for the plaintiff in the district court. Defendant appeals.—*Affirmed.*

Ainsworth & Antes, for appellant.

E. H. Estey, for appellee.

GAYNOR, J.—This action is upon two promissory notes, each dated October 15, 1917, and each for the sum of \$500. These notes were signed by one W. E. Heiserman and by the defendant, S. S. Patterson. Patterson alone, the defendant, appeals, and he interposes two defenses: (1) That the notes were altered in a material matter after their execution; and (2) that the plaintiffs are not the holders of the notes in question "in due course."

The defense that the notes were materially altered, was based upon the following alleged facts: That though, at the time the notes were executed by this defendant and Heiserman, the name of the payee was blank, yet, at the time the notes were delivered to the plaintiff, the name of the plaintiff was filled in as payee, and the plaintiff, without the knowledge and consent of this defendant, and in violation of the authority given to Heiserman, erased its name as payee, and substituted the name of Emma Heiserman. This is what defendant says was done, and on this he bases his claim.

The second defense is based on the following claim: That he signed these two notes, with the name of the payee blank, with Heiserman, with a distinct understanding and agreement that one of them was to be used in liquidation of an outstanding debt in the sum of \$500, and the other, to secure an additional loan of \$500, for the purpose of paying certain wholesale debts of Heiserman's; that, as a matter of fact, both of the notes were negotiated as collateral

security for money borrowed by the Heisermans from the plaintiff; that the negotiation to the plaintiff as collateral was without authority, and carried no liability against the defendant.

The case was tried to a jury, and a verdict returned for the plaintiff for the full amount of the notes.

There is no controversy in this case as to the signing of the notes, and as to the condition of the notes at the time they were signed by defendant. The name of the payee was then blank. The jury could well find, under this record, that, at the time the defendant signed the notes, he authorized Heiserman to negotiate them and to fill in any name as payee that he found necessary, in order to make them effectual for the purposes for which they were executed; that, when the defendant signed these notes and left them with Heiserman, there was authority on the part of Heiserman to procure money upon the notes to the amount of the notes; and further, that the source from which the money was to be obtained was not determined, as between the defendant and Heiserman, before or at the time the notes were signed and delivered to Heiserman to be negotiated. The record discloses that the notes were signed, and left by defendant in Heiserman's possession; that, without filling in the name of any payee in these notes, Heiserman went to the plaintiff bank, exhibited the notes, and told them that he desired to get money on them; that, before the notes were negotiated, and before any money was paid by the plaintiff upon the notes, Heiserman placed the name of this bank (plaintiff) as payee in the notes; that the notes were then brought to this bank, and the plaintiff refused to accept them with its name as payee. Thereupon, with the consent of Heiserman and his wife, its name was erased from the notes, and the name of Heiserman's wife placed in the notes, and she thereupon endorsed the notes in the following language:

"For value received, I hereby guarantee the payment of the within notes, waive demand, notice and protest.

"[Signed] Emma Heiserman."

Thereafter, the notes were negotiated to this plaintiff, and the plaintiff paid to Heiserman the full amount of the notes.

There is dispute as to these facts as we have recited them, but the jury could well have found the facts to be as we have stated them. But there is no dispute that the notes were not negotiated to the plaintiff or accepted by the plaintiff until they were completed by the insertion of the name of Emma Heiserman in said notes as payee. They were not negotiated to nor accepted by the plaintiff until after Emma Heiserman had endorsed the notes to it, as hereinbefore set out.

There is no contention made by the defendant that the evidence is not sufficient to justify the verdict, nor is it contended that there was not evidence to support the special findings of the jury upon the disputed points. The court submitted to the jury special interrogatories as follows:

"(1) Did the defendant, S. S. Patterson, authorize W. E. Heiserman or the First National Bank of Hawkeye (plaintiff) to use the two notes sued upon as collateral security for the indebtedness of Emma M. Heiserman?

"(2) Did the defendant, S. S. Patterson, authorize W. E. Heiserman, or the First National Bank of Hawkeye (plaintiff), to use the name of Emma M. Heiserman as payee in the notes sued upon?"

Both of these questions were answered by the jury in the affirmative, and a verdict was returned for the plaintiff for the amount of the notes.

While, upon this record, many questions might have been raised, touching the liability of the defendant upon the issues made and the evidence submitted, the defendant based his right to reversal upon two propositions only:

(1) That the court erred in the fifth instruction given to the jury; (2) that the court erred in refusing to give to the jury the first and sixth instructions asked by the defendant.

The fifth instruction complained of is in these words:

"The defendant, Patterson, admits upon the stand that, after said notes were signed and delivered to the plaintiff, he offered to pay said notes, but says that, at the time the offer was made, he had not seen the notes, and did not then know their condition. If you find from the evidence, the burden of proof being on the plaintiff to show, that defendant did make the admissions, by a preponderance of the evidence, that defendant knew the condition of the notes, and in what way plaintiff had them when he made the offer to pay, then you will consider this is an admission of this defendant that plaintiff was the rightful owner and holder of said notes, and that he was liable thereon, and you will take this admission into your consideration while weighing the evidence. On the other hand, if you find that defendant did not know the condition of the notes at the time, or how plaintiff held the same, you will disregard the admissions made by defendant, Patterson, and will not give them any weight as against him."

The theory of the defendant, in complaining of this instruction, as stated in his brief point, is that, by this instruction, the court injected an issue into the case that was not there; that the plaintiff had not pleaded either ratification or estoppel; and that this instruction told the jury that, if the plaintiff made an admission such as the instruction refers to, and such as the evidence shows he did make, that would be a ratification, and estop the plaintiff from pleading the defenses which he urges. A mere reading of the instruction shows that this objection was not well taken. The court practically said to the jury that they might consider his admission if they found it was made as claimed,

1. TRIAL: reception of evidence: admissions contradictory of defense.

practically saying to them that his admission, if inconsistent with what he testified to on the stand, touching the execution of the note, would have some weight in determining the weight to be given to the testimony which he had given on the trial. The plaintiff's evidence tended to show that, on the 5th day of November following the execution of the note, Patterson was in plaintiff's bank; that the notes were exhibited to him; that they were then in the same condition that they are now in; that the defendant made no objection to the notes, but said that he would pay them, and asked that they be sent to another bank for payment. If the testimony of the plaintiff is true, that, after they were negotiated to and in the possession of the plaintiff, the defendant saw the notes, and knew just how they were drawn, and, with knowledge of the then condition of the notes, made no objection to the form in which they were written, and promised to pay them, this certainly would be an admission which had some probative force in negating the testimony now given, that he never authorized the notes to be drawn in the form in which they were, and never authorized them to be negotiated to this bank. If the plaintiff's testimony is true,—and it was for the jury to say whether it was or not,—the defendant was fully informed of the character of the transaction that resulted in the negotiation of these notes to it, knew of the indebtedness for which they were pledged, and the extent of that indebtedness, knew the form in which the notes were drawn, made no objection, and thereafter promised to take care of the same. This certainly was proper evidence for the jury to consider, in determining the ultimate question in dispute, and that is all that the court said to the jury. It did not tell them that the plaintiff, by this, ratified an unauthorized act, nor did it say that the plaintiff was estopped from asserting the claims which it now makes. It was evidence tending to show that the negotiation of the notes to the

plaintiff was authorized, and inferentially tended to show that the defendant did not then regard the notes as not binding upon him. All the court said was that this admission had probative force, if the jury found that he made the admission, when they came to consider and weigh the whole evidence upon the issues tendered.

In reviewing this case, we confine ourselves to the errors assigned. While other questions might have been raised, they are not here for our consideration. There was no reversible error in the giving of this instruction.

The first instruction asked, the refusal to give which is complained of, is this:

"The court instructs the jury that the law imposes upon the party offering a paper in evidence the explanation of any alteration which may appear therein; and therefore, if the jury believe, from the evidence, that any alteration has been made in the note in question, the burden of proof is upon the plaintiff to explain the same, and, unless the jury believe, from the evidence, that such alteration has been explained by the plaintiff, the presumption of the law is that it was made by the plaintiff, and the jury *should find for the defendant.*"

This instruction could not have been given in the form in which it was asked. The instruction says that, where an alteration appears upon a paper, and no explanation is made of the alteration, there is a presumption that it was made by the plaintiff fraudulently, and that that, in itself, destroys the contract, and justifies the jury in finding for the defendant. The alteration may have been made by the consent of the parties. It may have been made under such circumstances as would be justified. Thus, Section 3060-a14, Code Supplement, 1913, provides:

"Where the instrument is wanting in any material par-

2. BILLS AND
NOTES: altera-
tion: failure
to explain.

ticular, the person in possession thereof has a prima-facie authority to complete it by filling up the blanks therein."

This instruction would destroy that statutory right, if enforced as presented by the defendant. While it may be true that, in case of a material alteration appearing upon the face of a paper, made after delivery, the burden of explaining or justifying the alteration is on the person claiming under it, and while it may be assumed that the alteration was made by the plaintiff, yet the fact that an alteration appears, without showing that it was a material alteration, made after delivery, would not defeat recovery, even though made by the plaintiff.

We think there was no error in refusing to give this instruction in the form in which it was drawn.

The sixth instruction asked by the defendant is as follows:

3. TRIAL:
inapplicable
instructions.

"You are instructed that delivery of the notes sued upon would be complete, upon the placing of the same within the *power* or *control* of the plaintiff, for his use and benefit, with the intention of giving them effect and operation according to their terms; and if you find from the evidence that there was such *delivery* to plaintiff, and that plaintiff or anyone else thereafter made a material alteration of said notes, then your verdict must be for the defendant, Patterson."

The Heisermans were not witnesses in this case, and what was done at the time these notes passed into the plaintiff's hands is shown only by the testimony of the plaintiff's officers, who transacted the business for the plaintiff in the taking of the notes; and this testimony shows the following facts:

L. E. Bopp, cashier of the plaintiff bank, testified:

"I had a conversation with Patterson, in which he stated that he signed the notes in blank, so we could fill in

whatever name we wished as payee. Before the notes were executed, about five days before they were executed, the bank had a deal with Heiserman, with reference to making him a loan. Shortly before the 15th of October, the day on which the notes were signed, Heiserman came to the bank with these two notes. At that time, the name of the payee was blank. In other respects, they were the same as they are now. After the notes were brought to the bank the first time, they were returned to him. He was to go home to get a description of the property, so that I could execute the papers for him to sign. When I first saw the notes, they were signed by W. E. Heiserman and the defendant, Patterson. I sent my brother for the papers, and he brought them back. They were all in a bundle. The plaintiff's name was inserted in the notes at that time. Heiserman had written in the name of the First National Bank of Hawkeye, as payee. It was not in accordance with the agreement we had with him. Heiserman was called in, and wanted to take a pen and run through the name 'First National Bank' and write in the name of Emma M. Heiserman. I told him not to do it; that I would take it out with an ink eraser, and would write the payee's name in with a typewriter. I took the name out, and inserted the name of Emma M. Heiserman as payee. At that time, W. E. Heiserman and his wife, Emma, were making arrangements to borrow money from our bank. W. E. Heiserman was there at the time, and I was in the bank when Emma M. Heiserman made the written endorsement on the back of each of the notes. In consideration of the execution and delivery of these two \$500 notes, and this \$1,900 note, I made a loan to William E. Heiserman and Emma M. Heiserman of \$1,000. This was in consideration of a receipt by the bank of these \$500 notes. The loan was made on the 16th."

It is apparent that the plaintiff bank refused to accept

the notes with its name as payee therein. It is apparent that the bank's name was erased with the knowledge and consent of Heiserman and his wife, and the name of the wife inserted in the blank space left for the name of the payee. The notes were then completed for the first time. They were negotiated to the plaintiff, with the name of the wife as payee. She endorsed and guaranteed the payment of the notes to the bank. The bank did not become the owner of the notes, or have any right, title, or interest in the notes until after the endorsement made by the wife, and the transfer of the notes to the bank. There is absolutely no evidence on which to base the instruction involving the thought that "the notes were placed within the power and control of the plaintiff for its use and benefit," with the intention of giving them effect and operation in accordance with their terms, before the defendant's wife's name was inserted as payee, and before they were endorsed and delivered by her to the bank. There is no evidence upon which the claim could be predicated that the plaintiff, or anyone else, after the notes were placed "in the power and control of the plaintiff bank, for its use and benefit with the intention of giving them effect and operation in accordance with their terms," altered these notes. The erasure of the plaintiff's name, which was inserted there without authority, and the insertion of the name of Heiserman's wife, were made before the notes were negotiated, before they passed into the hands of the plaintiff, "with the intention of giving them effect and operation according to their terms." Instruction 6, asked by the defendant, is not applicable to the facts disclosed in this record. Instead of enlightening the jury as to the rights of the parties in this controversy, it would have been confusing and misleading. We think the court was right in refusing it.

There is no complaint made of any instructions given, except Instruction 5, hereinbefore set out, and no error is

predicated on any thought that the court did not fully instruct the jury on every question involved in this controversy. The complaint is only of the refusal to give the instructions asked. If these instructions were not proper to be given to the jury, then we have no complaint here made by the defendant that justifies us in interfering with the verdict of the jury.

The grounds presented here for reversal do not justify us in interfering with the action of the court below, and the cause is—*Affirmed*.

WEAVER, C. J., LADD and STEVENS, JJ., concur.

AUGUST JASPER, Appellee, v. LOUISA JASPER, Appellant.

DIVORCE: Alimony—Unenforcible Decree—Modification. Decrees for alimony, proper in amount, but unenforcible by reason of the terms and lienability of unpaid payments, will be so modified on appeal as to render the decree effective.

Appeal from Muscatine District Court.—A. P. BARKER, Judge.

JANUARY 26, 1920.

REHEARING DENIED MAY 11, 1920.

AFTER the plaintiff dismissed his divorce petition, defendant obtained a divorce from him on her cross-petition. She complains of certain orders made by the court in the allowance of alimony.—*Modified and affirmed*.

Hoffman & Hoffman, for appellant.

J. G. Kammerer, for appellee.

SALINGER, J.—I. One claim upon which defendant was decreed a divorce on her cross-petition is that the plaintiff had deserted her. He has for some years been living in

Rock Island, Illinois. His wife, the appellant, has remained in their homestead. The trial court ordered that the husband pay his wife the sum of \$10 a month. It was further ordered that the title of the homestead should be in the husband, and that he should pay to his wife the sum of \$900, which the court found to be one half the value of the homestead. This \$900 was made a lien on the property, as was the said monthly allowance of \$10. It is fairly made to appear that it is inherently impossible to make all the provisions of the decree effective. The husband has made a sale of the property *pendente lite*. He cannot pay the \$900 unless he do sell. If he sells, it destroys the lien that secures the payment of the \$10 a month. It is fairly clear that, without this lien, it will be utterly impracticable to collect the monthly allowance from a defendant who lives outside of the state. There is no compelling reason for placing the title in the husband, absolutely. It is plain from the record that he has no sentiment connected with the homestead. He has abandoned it for some years, and has no intention to live in it. So far as appears, he has no desire to live in it. The wife does have a sentimental attachment for the homestead, and she and her children have occupied it; and, though the children are now grown, both the wife and these children desire to remain in the homestead.

The record does not justify us in finding, on the one hand, that the \$900 is not large enough, and, on the other, that it is too large; nor are we justified in interfering with the holding as to monthly allowance either on the ground that the allowance is not large enough, and, on the other hand, that it is too large. We have concluded that equity will best be served by a modification of the decree. We therefore order that the following decree be entered in this court, in lieu of the one entered by the trial court:

The title of the property shall be in the appellee. The

defendant may occupy the homestead during the term of her natural life, and, during such occupancy, shall keep the property in good repair and pay the taxes thereon, and make no other payment. If she shall at any time elect to remove, the title in the husband shall become absolute if, within 60 days after he is advised of such abandonment, he shall deposit with the clerk of the district court, and for the benefit of the wife, the sum of \$900. So long as said payment is not made, the interest of the wife shall, except as hereinafter modified, be and remain what it would be if the parties were not divorced, and the property remained their homestead. If the plaintiff shall survive the defendant, he shall have an election to take a one-half interest in the property, or to take title to all of the same, on payment of \$900 to the devisees or heirs of the defendant. The property shall stand charged with a lien for all monthly allowances made under the decree appealed from, and appellant may have special execution to enforce the collection of any such payments as to which there has been or shall be default by the sale of said property, subject to redemption.—*Modified and affirmed.*

WEAVER, C. J., EVANS and PRESTON, J.J., concur.

L. A. JESTER, Appellant, v. CLARA I. GRAY et al., Appellees.

CONTRACTS: Options—Non-Mutuality and Want of Consideration—Revocation. A written, exclusive option to purchase or sell property, for which option the optionee pays nothing and expends nothing except time and money spent by him in an effort to effect a sale, and wherein optionee assumes no obligation, may, without the consent of the optionee, be revoked by the optionor at any time before acceptance.

Appeal from Polk District Court.—THOS. A. GUTHRIE,
Judge.

JANUARY 20, 1920.

REHEARING DENIED MAY 11, 1920.

SUIT in equity for specific performance. The defense was predicated upon various grounds. There was a decree for the defendants, dismissing the petition. The plaintiff has appealed.—*Affirmed.*

Clark & Byers, for appellant.

Dale & Harvison, for appellees.

EVANS, J.—I. Plaintiff's suit is predicated upon the following written contract:

"For value received, we hereby grant to L. A. Jester or assigns, the exclusive right to purchase or sell the following described real estate, to wit: The north sixty (60) acres of the southwest quarter of Section thirty-two (32) in Township seventy-nine (79) in Range twenty-three (23), Polk County, Iowa. The terms of this option are as follows: The total consideration to be paid for said land in case this option is exercised shall be thirty-seven thousand (\$37,000.00) dollars, which shall be payable as follows: two thousand (\$2,000.00) dollars, on or before June 1, 1915, and the balance of thirty-five thousand (\$35,000.00) dollars on June 1, 1935, with interest at the rate of six per cent per annum, payable annually. In case this option is exercised the undersigned grantors agree to execute a contract of sale of said land upon the above terms, and to execute a deed to said land and to deposit the same in some bank in Des Moines, to be agreed upon by the parties to said contract, said deed and a copy of said contract to be held in escrow by such bank until the terms of said contract are fulfilled. Or at the option of the said L. A. Jester, or assigns, the grantors agree to execute and deliver to the said L. A. Jester or assigns upon payment of the two thousand

(\$2,000.00) dollars, as above provided for, a warranty deed to said land, and to take back a first mortgage on said premises for the balance of the purchase price, namely, thirty-five thousand (\$35,000.00) dollars, payable as above indicated. In case this option is exercised the grantors agree to furnish an abstract to said premises showing good and merchantable title.

"Executed in triplicate at Des Moines, Iowa, this 25th day of March, 1915."

On May 25th, the foregoing contract was extended by the following writing:

"For a valuable consideration, this option is extended for a period of 15 days from the above-mentioned date of expiration, and, if accepted, on or before June 15, 1915, the grantors herein agree to execute the contract hereto attached and made a part hereof.

"May 25, 1915."

To this extension was appended a form of contract, unsigned, and with blank spaces for dates and signatures. On June 11, 1915, the plaintiff purported to accept the option and tender performance. The real estate described was owned in common by defendants Clara and Ruth Gray. The original option was executed by their father, Henry Gray, who assumed authority to represent them, and acted in good faith in their interest, as he believed. The extension above set forth was executed by Clara Gray. She also signed the same for Ruth Gray, assuming to represent her.

The pleadings made issues on the question of authority of the agent, and on ratification, and on false representations. We shall have no occasion to deal with the question of agency; nor was there any evidence of false representations. The brief of appellant bases its grounds of reversal wholly upon the issues of fraud, agency, and ratification. There is another issue made by the pleadings which is whol-

ly ignored in appellant's brief. It is whether the option was withdrawn, prior to its acceptance.

It was pleaded that the option contract lacked mutuality, and was without consideration, and that, long prior to its acceptance by the plaintiff, it had been withdrawn by the defendant. On that issue, the defendant Clara Gray testified as follows:

"After May 25th, when I signed this extension agreement, I next saw Mr. Jester, I think, on the 1st day of June, at his office. Miss Moss and I went over there to withdraw from the option, and I told him that that was my mission. He asked me what my reasons were, and I told him that, the first morning we were there, I was of the same mind; that I did not want to go into the proposition; that I did not want to enter into it. I told him that I wanted to withdraw from the option. That was the first day of June, 15 days before the option expired; and, at first, he was agreed that that was all right. He said he did not want to have any trouble about it. I told him I did not anticipate that there would or should be trouble; that I had come in time,—that is, before the 15th: and he said that he should receive something for his time and work; that he had been working on this since last fall: and I told him of course I did not know anything about the time he had spent on the work, because I had not heard of it in any way before the 19th of March. * * * My father and I saw Mr. Jester at his office the second of June. Father made the first statement that we wanted to withdraw; that I did not want to go on with the option or contract. There was a discussion more or less with them to this effect. Mr. Jester at that time was not as favorable to our going ahead. He said 'No;' that he would have to be considered; his time and all and labor in that would have to be considered. We found there wasn't any conclusion could be reached; that Mr. Jester would not consider that we had withdrawn from

the contract. I did not see him from that date to the time of the tender on June 11th, but I had a telephone communication in the meantime. He said, in that last interview with father and I in the office, that he thought we had better reconsider and go right on, and not say anything today, but call him by phone at 1:30 the following day or the next day. I called him the following day, and told him I would refer him to you, my attorney. He said there was no necessity of that. He seemed quite put out to think I had put it in my attorney's hands, and said that 'We will just fix it up, and there is no use of calling anyone in about that.' I did not say anything. Had nothing more to say."

Mabel Madden testified for the defendants as follows:

"I was formerly Mabel Moss. I live in the city. I am acquainted with Clara and Ruth Gray and their father. I met Mr. Jester on Monday, the 1st of June, 1915, at his office. Clara Gray was with me. She introduced me, and asked first to see the option, the paper that she had signed, because she was not clear as to what it was she had signed. and Mr. Jester said he did not have that paper with him,—that it was in the vault, I believe; but, anyway, we did not get to see the paper. Then Clara said she come over for the purpose of withdrawing, and he said, 'Well;' and he stood there a little while, and asked her why she wanted to withdraw—what her reasons were; and she told him; and he asked her over again that time, if she didn't consider him, because she said it was a business proposition with her; and finally his remarks were that she could withdraw, but because he had never had any lawsuit before, he certainly wouldn't want any with any of the Grays, nor a young lady, and that she could withdraw. As we were leaving, he said, 'Of course, I have spent all my time, and I have spent time since last fall;' and that he would expect some consideration for the time he had spent on the case, and Clara said that she couldn't pay for that."

In response to the foregoing, the plaintiff testified in rebuttal as follows:

"I did not, at any time or anywhere or to anybody, suggest or indicate in any way that anybody could withdraw from this contract."

"Cross-Examination.

"I remember saying to Miss Gray, in the presence of Mrs. Madden, that I had never had a lawsuit with anybody, and I did not want to have a lawsuit with one of the Grays. I said that, and it is true; and particularly that I did not want to have a lawsuit with a young lady."

It will be noted from the foregoing that the plaintiff's only denial is to the effect that he himself did not consent to the withdrawal of the option. In all other respects, the testimony of Mrs. Madden and of defendant Clara is undisputed.

If the option contract was, as a matter of law, revocable, it is apparent that Clara made an insistent effort to revoke the same. Formality was not required for such revocation. Her insistence upon revocation was revocation. If revocable, the consent of Jester was not necessary, nor was the effort of Clara to gain his consent material. The substance of this evidence is that Clara had two interviews with the plaintiff, on June 1st and 2d, respectively, wherein she insisted upon a withdrawal of the option. At the last interview, plaintiff asked that she reconsider, and let him know by phone, the following day. It appears also in the record that she did call him by phone, the following day, and advised him that she had placed the matter in the hands of her attorney, and that the plaintiff could confer with him. Ruth was absent from the state, and had been so absent from a time prior to the date of the original option. Clara also had been absent from the state for a long time prior to the date of the option. She returned on the morning of May 25th, the date on which she signed the

extension. The matter having been placed in the hands of her attorney, the plaintiff had an interview with the attorney, on June 10th. Ruth was expected home on the next day. The attorney advised the plaintiff that he would confer with his clients, as soon as Ruth came, and would advise the plaintiff on the result of the conference on Monday, June 13th. On June 11th, however, the plaintiff served upon Clara the notice of acceptance and tender. There is no question, upon this record, but that plaintiff understood, before he served such notice of acceptance, that Clara had declined to be further bound by the option. There was nothing more that she could have done to bring the withdrawal to the notice of the plaintiff. This was all that was necessary to make the withdrawal effective. We proceed to inquire, therefore, whether the contract was revocable.

II. The contract purported to be an option. It contained no promises to be performed by the optionee. It is conceded by plaintiff that nothing was paid therefor. The only consideration contended for is a matter of legal conclusion, based upon the following testimony of the plaintiff:

"I did not pay Ruth and Clara Gray anything in money for this original option. I expended a good deal of time working, partially before and partially after I talked with Henry Gray."

The foregoing testimony is amplified in the reply argument of appellant by a statement that he was promoting an addition, which would include the tract in question and adjoining tracts, and that this was known to the contracting parties, and that he was also looking for purchasers for the tract. If a consideration for the option can be thus supplied, with mere subsequent voluntary conduct of the optionee, then an option offer would seldom be revocable. It may fairly be presumed that every optionee does something, after obtaining his option, looking to his possible acceptance

thereof. In *Axe v. Tolbert*, 179 Mich. 556 (146 N. W. 418) it was expressly held that:

"Time and money spent by a party in trying to sell property for which he holds an option cannot be construed as a consideration to the party from whom he has secured the option."

We agree with that view. An option without consideration is a mere offer, and is not binding until its acceptance. It necessarily follows that it may be withdrawn before its acceptance. In *Hopwood v. McCausland*, 120 Iowa 218, we said:

"An option is not a sale. It is not even an agreement for a sale. At best, it is but a right of election in the party receiving the same to exercise a privilege, and only when that privilege has been exercised by acceptance does it become a contract to sell."

There was not a moment, prior to June 11th, when the plaintiff was bound to anything under this option. He had parted with nothing, and had made no promises. There was, therefore, no consideration, and the option was revocable.

Even in reply argument, the appellant has declined to be drawn into argument on this issue. He has been content to characterize the position of appellee as inconsistent, and therewith to dismiss its consideration. At first sight, there seems a measure of inconsistency in the successive interviews, where one was sufficient; but this would go only to the credibility of the testimony. Its credibility, however, is vouched for by the plaintiff himself, by his limiting his denial thereof to the question of his own consent. Accepting his testimony that he did not consent to a withdrawal, the fact remains that he asked Clara to reconsider her decision, with more or less importunity. This latter request accounts for the telephone interview. It was not consistent in Clara to try to obtain his consent. She might quite naturally have felt uncertain about her rights without his consent.

She had asked for the instrument itself at the first interview, and had failed to get it. She testified that he "at first" consented. Afterwards, he protested that he was entitled to consideration. The situation confronting her was perplexing enough, if she had been experienced in the business. This was her first real estate transaction. The fact, therefore, that she did more than was required of her, or that she sought the plaintiff's consent when she did not need it, is not very glaring as an inconsistency.

We reach the conclusion that the contract in question was a revocable option, and that it was revoked before acceptance.

The decree entered below is, therefore,—*Affirmed.*

WEAVER, C. J., LADD, GAYNOR, PRESTON, SALINGER, and STEVENS, JJ., concur.

Supplemental Opinion on Rehearing.

EVANS, J.—Complaint is made in the petition for rehearing that our opinion heretofore filed failed to deal with one issue in the case. The record discloses that the plaintiff filed an amendment to his petition in the court below, whereby he made Henry Gray a party defendant, and whereby he claimed to recover from him and from the original defendants the sum of \$1,000. upon the following agreement:

"We, the undersigned, hereby agree to pay L. A. Jester the sum of one thousand (\$1,000.00) dollars as consideration for services in case he exercises or causes to be exercised the option to purchase or sell this day given to him by the undersigned on the premises described as the north 60 A. of the S. W. quarter of Sec. 32, Twp. 79, Range 23, Polk County, Iowa. Said payment to be made at the time said option is exercised.

"Dated at Des Moines, Iowa, this 25th day of March, 1915.

"[Signed] Clara I. Gray

"Ruth Gray,

"By Henry Gray, Agent."

The agreement above set forth was contemporaneous with the execution of the original option contract, and, in legal effect, was a part of the same transaction.

As respects the obligation thereunder of the principal makers, our conclusion announced in the original opinion as to the legal effect of the option contract is necessarily determinative of the legal effect of this contract as a part thereof. The promise to pay, herein set forth, was contingent and conditional upon a completed sale.

The same reason would stand in the way of any recovery as against Henry Gray. As to him, there is the further reason that he signed the contract only as the purported agent of his principals. It is elementary that an agent is not ordinarily liable for the contract of his principal. It is only when he conceals the agency or withholds the name of his principal or exceeds authority or is guilty of some fraud as an inducement to the contract that a liability may arise as against him. Nothing appears herein to take this case out of the ordinary rule. Though it be true that an issue was made in the pleadings on the agent's authority to enter into the option contract for his principals, yet such issue was not pressed in the evidence for defendants, and the disposition of the case did not turn upon such issue. Even if the plaintiff were now able to prove that the agent did exceed his authority, and did thereby render himself liable in lieu of his principals, still he would be liable only to the same extent as the principals *would have been* if the purported act of agency had been authorized by them. Inasmuch as we dispose of the main case against the principals on the assumption that the act of agency was authorized,

and find, nevertheless, that the option contract was duly revoked by the principals, nothing is left upon which liability can be predicated, either against them or against their purported agent. The finding of due revocation of the option contract carries down plaintiff's entire cause of action thereon, and leaves no remnant.

The petition for rehearing must, accordingly, be overruled.

MARIAN J. HARRIS, Appellee, v. POLK COUNTY INVESTMENT COMPANY, Appellant.

PRINCIPAL AND AGENT: Fraud by Agent of Corporation.

A corporation which concedes that, in the making of a land sale contract, it was represented by a named person, may not say that such person had no authority to make representations in regard to the land.

FRAUD: Examination Excluding Reliance on Representations.

An examination of property prior to purchase does not necessarily exclude reliance or right to rely on representations relative to the property. Such issue is ordinarily for the jury. So held as to representations as to the tillability and nonoverflow nature of the land.

Appeal from Polk District Court.—GEORGE A. WILSON,
Judge.

MAY 11, 1920.

ACTION to recover damages based on alleged false representations made in the exchange of lands.—*Affirmed.*

Brammer, Lehmann & Seevers, for appellant.

McHenry & Powers, for appellee.

GAYNOR, J.—This action is brought to recover damages for false representations, alleged to have been made by the defendant to the plaintiff in effecting a trade of real estate.

1. PRINCIPAL AND
AGENT: fraud
by agent of
corporation.

The trade is alleged to have taken place on or about the 20th day of May, 1918. At that time, the plaintiff was the owner of certain real estate, and the defendant was the owner of certain other real estate. A trade was effected between them, by which the title to plaintiff's property passed to the defendant, and the title to defendant's property passed to the plaintiff. The terms under which the exchange was made, were agreed upon, and the deal consummated. The plaintiff claims that, to induce her to make the exchange, and to transfer her property to the defendant, the defendant falsely represented that the land which she received in the exchange was tillable land, and that the same *never overflowed*; that, as a matter of fact, it was not tillable land, and that it *overflowed* nearly every season; that this representation was made to induce the trade; that it was false; that the defendant knew it was false; that plaintiff did not know it was false, relied upon it as true, and made the exchange; that the property received by her was not worth as much as it would have been if it had been as represented; that, because of its overflowing frequently, its value is less than it would have been, had it been as represented. Plaintiff claims she is damaged by these false representations in the sum of \$1,500.

It is not necessary, for the purposes of this case, to set out the description of the several tracts of land. It appears that the negotiations for the exchange were started by one Newton, who claimed to represent the defendant, and who claimed to have the right to represent the defendant in bringing about the exchange. Whether he represented the defendant or not, in the view we take of this case, is immaterial. The deal was finally consummated and the exchange made through one Frost. It appears that, before the exchange was made, the plaintiff visited the land, in company with Newton, and we assume that Newton made the state-

ments which plaintiff claims were made by him to induce her to make the contract. We may assume, without deciding, that Newton had no authority to make these representations, and we may assume, without deciding, that they were not binding upon defendant, because of the want of authority in Newton to make them. We may assume, without deciding, that these representations were not within the scope of the authority of Newton to make, and we may assume, without deciding, that, if the defendant knew nothing of these representations, was not a party to the fraud and deceit practiced by Newton, it is not bound by his fraud. Such assumption, it is claimed, is in line with the holding made in *Ellison v. Stockton*, 185 Iowa 979, and would follow, though Newton was employed by defendant to find a purchaser. But the record shows that the defendant is a corporation. The answer of the defendant admits that, on the 20th day of May, 1918, a trade was made between the plaintiff and the defendant, and that the defendant in the trade was represented by Frost; that, in this trade, plaintiff's land was transferred to the defendant, and defendant's land transferred to the plaintiff. The evidence shows that, before this trade was consummated, Newton and the plaintiff visited defendant's land, and, while on the land, Newton was asked whether or not the land overflowed, and he informed plaintiff, in positive terms, that it did not. The fact is that it did overflow, and had overflowed frequently during the past. Newton, however, asserted it to be a fact, of his own knowledge, that it did not, in fact, overflow. There was evidence of a creek there, or a run; but it was dry, at the time the plaintiff visited it, and this may have prompted the question. But, however that may be, after this visit, and after Newton had made this assertion touching the character of the land, the record shows that the plaintiff called on Frost. Some controversy arose as to some details in the transaction between her and Frost. Frost told her that Newton had no

authority in the matter, except to *show* the property. He said, "If you make a deal, you will make it with me, as agent of the Polk County Investment Company."

The plaintiff testified that, before the deal was consummated, she talked with Frost. She says:

"Before I signed the papers, I asked him [Frost] if everything Mr. Newton had represented to me was true, and Frost said 'Yes. You are perfectly safe. I am perfectly responsible for any deal that is made.' I signed the papers, and left his office. We talked about the land out there and the price and everything. I wanted to go over and see my attorney, before I signed the papers. Frost said it was not necessary, because he was perfectly responsible for the deal. He said, 'I am head of the company, and will stand back of anything I do.' I explained to him how Newton had taken me out and shown me the property, and told him all that Newton had said; that Newton told me the property was a good place for a building site, that it was a valuable piece of property, and would make a nice home for us, that it *did not overflow*. I explained to him what Newton had said. Mr. Frost said '*It is all right.*' Thereupon, the papers were executed."

It is the contention of the defendant that neither Frost nor Newton is shown to have had authority from the company to bind the company by any false representations; that they were merely agents of the company, and that their agency was not of such a character as to include the right to make these false representations, and bind the company; that the defendant was an innocent vendor, practiced no fraud, and cannot be held responsible for the fraud of its agents, unless it is shown that the agents were authorized by the defendant to make the false representations, or that it subsequently ratified the false representations, with knowledge that they were made, and with knowledge that plaintiff was relying upon them in making the deal. How it

can be claimed that Frost was the mere agent of this company, with no authority to bind the company, in the face of this record, we are not able to see. If the *company* made false representations, it is bound. If, before the deal was consummated, the company knew that these false representations were made, and that the plaintiff was relying upon them, and re-affirmed and re-asserted the representations as true, it made the representations its own, and it became the falsifier, and responsible for the fraud. The record shows that, before the deal was finally consummated, Frost was fully informed of what Newton had said, touching this property, and assured plaintiff that the facts were as Newton stated them. If Frost represented the company, then it was an assurance by the company itself. It is claimed that there is no evidence that Frost was other than an ordinary agent of the company; but the answer itself concedes that, in making the trade, it was represented by Frost. This answer is, therefore, an admission that this trade with the plaintiff was made by defendant, acting through Frost; that Frost acted for the defendant, at the time the trade was consummated, and, so acting, re-asserted that the facts stated by Newton were true. It was for the jury to say whether or not Newton made these representations. He denies that he did. It was for the jury to say whether Frost re-affirmed these statements, if made by Newton, after knowledge that Newton had made them; whether the re-affirmation as to these statements was made before the deal was consummated; whether the plaintiff relied upon the representations in making the trade; and whether or not the defendant knew that the representations were false. The defendant is a corporation. It can act only through its "representatives." They are its eyes, its ears, its feet. All that it does, all that it says, all that it thinks, must be done through representatives; and it concedes that Frost was its representative in the transaction,—as it were, its *alter ego*. It appears that Frost

acted for the defendant in consummating the deal, in preparing and exchanging papers, and in performing for the defendant the conditions of the contract. In fact, every act that the defendant could have done to consummate the contract was done through the instrumentality of Frost. The case could hardly be stronger than it is, if Frost were the defendant in the suit. We think there was no ground for a holding on the part of the court that the representations charged to have been made, shown to be false, and material to the trade, were not made by the defendant itself.

This brings us to the consideration of the other branch of the case.

It is urged that, because the plaintiff visited the land before the deal was consummated, had an opportunity of seeing the land, and judging for herself whether it was good, fillable land, or whether it overflowed, she

2. FRAUD: examination excluding reliance on representations. cannot now be heard to say that she was deceived by these fraudulent representations.

or that she relied upon them. Whether a purchaser is deceived or not is ordinarily a question of fact for the jury. No general rule can be laid down that is applicable to all cases. It is true the record shows that plaintiff saw and knew that there was a run through this portion of this land, but it also shows that this run was dry, at the time she was there; that she passed over it without wetting her feet. She saw the run, or the bed of the stream, as we may call it, but she had no previous knowledge of the action of the water in this stream. It is true she said that she knew something about the streams in Iowa, and knew that streams did overflow. But whether streams overflow or not, even in Iowa, depends largely upon the topography of the country, the quantity of water that accumulates at any particular point, and its levels. She is not shown to have made any observations on these points, or to have had any information. The defendant positively assured her that it did not

overflow. It is now saying that she had no right to rely upon these positive assertions made by the defendant. It is a fraud to assert a fact to be true which the party making the assertion has no reasonable ground for believing is true, or which he knows to be false, at the time he makes it. We are inclined to think that the evidence here would justify the jury in saying that the defendant knew this representation was false, at the time it was made, and, therefore, the *scienter* was supplied which is essential to a charge of fraud. This woman was a boarding house keeper. It is true she had dealt somewhat in lands, but there is no evidence that she had dealt extensively, or that she had any expert knowledge touching the matter about which she inquired, nor does the record show that a view of the premises would convey a knowledge to her which would negative her right to rely upon the positive statement of the defendant. The facts in no two cases decided by this court are exactly alike. Nothing but general principles can be laid down, to guide in determining whether or not an opportunity to view is equivalent to knowledge of conditions which might be known from a view. As holding that it is ordinarily a question for the jury, see *Boddy v. Henry*, 126 Iowa 31, and cases therein cited. For a discussion somewhat of the question here involved, see *Bell v. Byerson & Barlow*, 11 Iowa 233; *Moore v. Howe*, 115 Iowa 62; *Shuttlefield v. Neil*, 163 Iowa 470. These cases simply hold that, where the defect is open, and as obvious to the buyer as it was to the seller, there can be no recovery for false representations. This is the general rule, but it still remains a question for the jury to say whether, in any particular case, the matter concerning which the false representations were made, was as open and obvious to the buyer as it was to the seller, and whether or not it was made falsely, for the purpose of inducing a sale, which a knowledge of the truth would have prevented. See, also, as bearing upon the question of whether the plaintiff

is estopped by a view from asserting that she was deceived by the false representations, *Hale v. Philbrick*, 42 Iowa 81; *Carmichael v. Vandebur & Hopkins*, 50 Iowa 651; *McGibbons v. Wilder*, 78 Iowa 531; *Brett v. Van Auken*, 99 Iowa 533; *Hetland v. Bilstad*, 140 Iowa 411; *Fulton v. Fisher*, 151 Iowa 429; *Van Vliet Fletcher Auto Co. v. Crowell*, 171 Iowa 64; *Franke v. Kelsheimer*, 180 Iowa 251. We think it was a fair question for the jury whether, under all the circumstances, the plaintiff had a right to rely upon the representations made, on the falsity of which she predicates her right to damages.

It is next contended that the verdict is excessive. It is not so excessive as to indicate passion or prejudice. There is evidence to support the verdict. The amount of plaintiff's damages was a fact to be ascertained by the jury, under proper instructions. The amount allowed is not such as indicates passion or prejudice. We do not feel that we can reverse the case upon this ground.

Upon the whole record, we think the case ought to be, and it is,—*Affirmed*.

WEAVER, C. J., LADD and STEVENS, JJ., concur.

SIMON W. HAVEN, Appellant, v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellee.

NEGLIGENCE: Violation of Law—Effect. Failure to give the
 1 law-required signals of the approach of a car which was moving up behind an injured party presents a jury question on the issue of defendant's negligence.

NEGLIGENCE: Distracted Attention. One who has his attention
 2 diverted, in a place of danger, presents a jury question on the issue of contributory negligence, if his conduct was such as to be in harmony with what reasonably careful men would have done, under like circumstances. *Held*, such question was presented in the case of one who, with a pane of glass in his

hands, was running in the mud after his hat, in the presence of a smoke-enshrouded train, which was approaching without signal.

Appeal from O'Brien District Court.—WILLIAM HUTCHINSON, Judge.

JANUARY 12, 1920.

REHEARING DENIED MAY 11, 1920.

SUIT to recover damages for injury sustained at one of defendant's crossings. Verdict directed for defendant. Plaintiff appeals.—*Reversed and remanded.*

Claud M. Smith and R. J. Locke, for appellant.

Hughes & Sutherland and O. H. Monzheimer, for appellee.

SALINGER, J.—I. Appellee defends the action of the trial court with the claim that it was, as matter of law, not guilty of any negligence, and that, as matter of law, the negligence of plaintiff contributed to the injury suffered by him. It was error to direct verdict against plaintiff if either of these defenses should have been submitted to a jury.

The plaintiff was struck by a car, moving up behind him as he was walking. We think a jury could find that defendant violated both statute and ordinance law by failing to ring the bell, or to give plaintiff other warning that the car was in motion and moving toward him. This alone made negligence a question to be submitted to the jury. *Pinney v. Missouri, K. & T. R. Co.*, 71 Mo. App. 577.

II. Was the court justified in holding, as matter of law, that plaintiff was guilty of contributory negligence? The law on that point is not doubtful. The question is ordinarily one for a jury. *Dusold v. Chicago G. W. R. Co.*, 162 Iowa 441. Super care is not required. *Wilkins v. St. Louis, I. M.*

1. NEGLIGENCE:
violation of
law: effect.

2. NEGLIGENCE:
distracted
attention.

& S. R. Co., 101 Mo. 93 (13 S. W. 893). Plaintiff need not go beyond satisfying the jury that he used ordinary care. *Dusold v. Chicago G. W. R. Co.*, 162 Iowa 441. He is not guilty of contributory negligence merely because he disregards the fact that a train occupies a portion of a street. *Robinson v. Western P. R. Co.*, 48 Cal. 409. In strictness, this case does not involve failure to look and listen. But if it did, the failure to look and listen for an approaching train, is not negligence, as a matter of law. *Willfong v. Omaha & St. L. R. Co.*, 116 Iowa 548; *Toledo, P. & W. R. Co. v. Hammett*, 220 Ill. 9 (77 N. E. 72). One is not necessarily guilty of contributory negligence because he fails to look and listen at all points in his passage. *Winey v. Chicago, M. & St. P. R. Co.*, 92 Iowa 622; *Davitt v. Chicago G. W. R. Co.*, 164 Iowa 216; *Mitchell v. Union Terminal R. Co.*, 122 Iowa 237. There is no inflexible rule that requires one to look and listen under all circumstances. *Dusold v. Chicago G. W. R. Co.*, 162 Iowa 441. That plaintiff would not have been struck by a train, had he acted differently than he did, does not conclusively establish contributory negligence. *Wiese v. Chicago G. W. R. Co.*, 182 Iowa 508. The fair summary is that contributory negligence is for the jury if reasonable men may find that, considering all the attending circumstances, the conduct of the plaintiff was in harmony with what ordinarily careful and prudent men would do in the like circumstances. It may, therefore, be fairly said that whether the plaintiff was negligent is always a jury question, if his attention is so diverted as that reasonable men may believe he gave as much attention to protecting himself as ordinarily careful and prudent men would have given on like diversion. It remains to be seen whether there is any evidence of such diversion. While a diversion will not make a jury question of contributory negligence where lack of care is due to inattention or forgetfulness (*Bender v. Incorporated Town of Minden*, 124 Iowa 685), if

there is a diversion which naturally throws one off his guard, it may show freedom from contributory negligence. *Artz v. Chicago, R. I. & P. R. Co.*, 34 Iowa 153. We are of opinion that here was such diversion. If facts exist which tend to complicate the question of contributory negligence, it becomes a question for the jury. *Laverenz v. Chicago, R. I. & P. R. Co.*, 56 Iowa 689; *Selensky v. Chicago G. W. R. Co.*, 120 Iowa 113. It is unnecessary to be exhaustive. At some point in the passage of the plaintiff, his hat was blown from his head, and he engaged in its pursuit and recovery. He carried a large pane of glass under his arm, which required some attention, especially during the episode of the blown-off hat. The ground under foot was muddy, and that would induce some attention to walking, especially since, at the time, the weather was stormy, misty, and windy. The engine and car had smoke and steam blowing about them. The plaintiff saw a team approaching, and, when he last looked, saw it proceeding as though no train was approaching or in the way; and the jury might reasonably hold that this was an assurance to plaintiff that he was in no danger in going forward. The jury could find that the warnings required by law were not given. Plaintiff had the right to place some degree of reliance on the presumption that the trainmen will do their duty, and sound the usual signal of warning in approaching him. *Mitchell v. Union Terminal R. Co.*, 122 Iowa 237; *Case v. Chicago G. W. R. Co.*, 147 Iowa 747; *Willfong v. Omaha & St. L. R. Co.*, 116 Iowa 548; *Balcom v. City of Independence*, 178 Iowa 685; *Dusold v. Chicago G. W. R. Co.*, 162 Iowa 441; *Pinney v. Missouri, K. & T. R. Co.*, 71 Mo. App. 377; *St. Louis & S. F. R. Co. v. Dawson*, 64 Kan. 99 (67 Pac. 521); *Robinson v. Western P. R. Co.*, 48 Cal. 409; 2 Thompson on Negligence, Section 1677. The jury could find freedom from negligence, because there was such right to rely. The case of *Laverenz v. Railway*, 56 Iowa 689, gives some support to our conclusion that here

contributory negligence was a jury question. In *Lorenz v. Burlington, C. R. & N. R. Co.*, 115 Iowa 377, that question was sent to the jury, where one failed to look and listen because he was attempting to drive back a cow that had escaped from him. Some support for our conclusion is furnished, also, by *Illinois Cent. R. Co. v. Hays' Admr.*, (Ky.) 84 S. W. 338.

We are not overruling cases like *Tierney v. Chicago & N. W. R. Co.*, 84 Iowa 641; *Kennedy v. Chicago & N. W. R. Co.*, 68 Iowa 559; *Bussler v. Chicago, M. & St. P. R. Co.*, 165 Iowa 361; *Powers v. Iowa Cent. R. Co.*, 157 Iowa 347; *Swanger v. Chicago, M. & St. P. R. Co.*, 132 Iowa 32; and *Williams v. Chicago, M. & St. P. R. Co.*, 139 Iowa 552. In those, there *was* contributory negligence, as matter of law. What we are now holding is that, though this is so under the facts of those cases, here the question whether plaintiff was free from negligence was for the jury.

Nor are we overlooking the line of authorities to the effect that, where one suffers from an infirmity, such as deafness or defective sight, such infirmity enters into whether he was as careful to avoid injury as one in his condition ought to be. *Toledo, P. & W. R. Co. v. Hammett*, 220 Ill. 9 (77 N. E. 72); *Galveston, H. & S. A. R. Co. v. Ryan*, 80 Tex. 59 (15 S. W. 588). And this question has full consideration in *Balcom v. City*, 178 Iowa 685. This plaintiff seems to have been slightly deaf. But all that the law requires is that he exercise what is ordinary care in one so afflicted. He is not required to use more care than persons who have all their faculties. Both must use ordinary care. But it may become a jury question whether ordinary care was used, in view of this infirmity. The infirmity is but one item of fact to be considered in passing upon the ultimate question. And though this infirmity was present, it was still for the jury to say, on the facts in this case, whether

or not plaintiff used ordinary care to avoid being injured.—
Reversed and remanded.

LADD, EVANS, and PRESTON, JJ., concur.

T. D. McCARNEY, Appellee, v. D. S. LIGHTNER, Appellant.

APPEAL AND ERROR: Intermediate Orders (?) or Final Judgment (?) A litigant is not *compelled* to appeal from interlocutory orders. He may save his exceptions, and await the *final* judgment, and appeal therefrom, and *then* have a review of every adverse, interlocutory order leading up to the final judgment.

APPEAL AND ERROR: Calendar Entry (?) or Final Judgment (?) An appeal taken within the statutory time after the judgment is entered in the *record* is timely, irrespective of the date of the *calendar* entry.

PARTNERSHIP: Profits and Losses—Land Deal. Two parties are not *partners*, as between themselves, when one party is obligated to bear *all* the expense and *all* the losses, while the other party is to have half the ultimate *profits*. So held in a land deal, wherein the profit-sharing beneficiary was denied a partnership accounting.

BROKERS: Principal and Agent (?) or Partners (?) An agreement under which one party to a land deal furnished *all* the money and bore *all* the expense, and the other party was to have half the ultimate *profits*, does not constitute the profit-sharing beneficiary a *partner*.

BROKERS: Profits as Commission—Termination of Contract. Where a broker was to have a commission, measured by half the profits realized on a retransfer of the land, and the land was transferred at a *loss*, held, on a detailed review of the evidence, that the parties understood that the agent's right to profits terminated at least as early as the first transfer, and was not kept alive as to later trades.

CONTRACTS: Performance—Failure to Fix Time. Principle recognized that, in the absence of a contract time for performance, the law will imply a reasonable time.

Appeal from Greene District Court.—E. G. ALBERT, Judge.

JANUARY 20, 1920.

REHEARING DENIED MAY 11, 1920.

SUIT in equity for an accounting under an alleged partnership. The fact of partnership was specially denied by the defendant. There was also a general denial of all liability. There was a decree finding the existence of a partnership between plaintiff and defendant, and adjudging the defendant liable to the plaintiff under an accounting thereunder for a large amount. The defendant appeals.—*Reversed.*

Church & McCully and Clark, Byers & Hutchinson, for appellant.

A. D. Howard and E. G. Graham, for appellee.

EVANS, J.—By his petition, the plaintiff claimed that, in August, 1912, he and defendant entered into an agreement of partnership, for the purpose of purchasing a certain quarter section of land in Dallas County and reselling same at a profit; that, pursuant thereto, they did purchase the same; that the defendant was to furnish all the purchase money, and did so furnish the same, and the title was taken in his name; that, subsequently, he traded the land to Stout, and traded the Stout land to Roper, and sold the Roper land to Vogel. The plaintiff claims that all these lands belonged to the partnership. The defendant denies generally all these allegations, and avers the facts to be that he did, in August, 1912, agree with the plaintiff that he would buy the certain quarter section of land which was for sale, subject to a future settlement on March 1st, and that, if the plaintiff, who was a land agent, could sell the same before settlement day, he should receive half the profits, and that, if he failed to do so, he was to procure for defendant a

loan of \$10,000 upon the property, at 5 per cent interest, without commission; that the property was purchased, pursuant to such agreement, and that the plaintiff failed to sell the same, and failed to procure a loan thereon at settlement time, without commission; that, one year after the defendant acquired such farm, he traded the same at a loss; and that the agreement between the parties had been terminated long before, or, at least, was terminated at the time of and by such trade.

The plaintiff was a land agent, and justice of the peace in his township. The defendant was a farmer and a stock shipper. The parties lived in the same township, four miles apart. As land agent, the plaintiff had, sometime previous, sold a farm to the defendant. As justice of the peace he had a continuous business for him, in looking after and collecting from the railroad company for overcharges and losses in shipment of stock. The quarter section involved belonged to the four heirs of the Simpson estate, one of whom was the wife of the defendant. The defendant had been the administrator of such estate, and, as such, had listed the land with the plaintiff for sale. The heirs had agreed upon a price of \$90, but no purchaser at that price had been found. Thereafter, the defendant's wife instituted a partition suit, wherein a referee was appointed, who advertised the place for sale. A purchaser was finally found by the referee, one Thompson, who was willing to buy at the price. Thereupon, the defendant, through McCarney, raised the bid, and brought on some counter bidding by Thompson. The final result was that the defendant's bid, through McCarney, \$14,750, was accepted as the highest bid. This was in August, 1912. The substance of the plaintiff's direct testimony was as follows:

"After I had received this offer for \$115 per acre, Dave came into my office,—that is, D. S. Lightner,—and says, 'Let's buy the farm.' The answer I made,—this was before

the partition suit,—that was before he was to get a referee appointed,—I says, 'Dave, I have no money to buy the farm.' 'Well,' he says, 'The devil. I will furnish the money, and we will divide the profits.' I says, 'If you will do that, I am willing to go in.' He says, 'We might as well have the profits as those girls;' that they would spend it anyhow. He says, 'Tom, I don't want them to know that I have anything to do with the farm. You go ahead and buy the farm, and I will furnish the money, and we will divide the profits, and they won't know anything about it,' and I did. After the referee was appointed, he says to me, 'I don't believe I will have anything to do with it.' I says, 'If you don't want anything to do with it, it is too good a deal to let go,' and I says, 'If you don't want to go into the deal, Dan O'Donnell, cashier of the Savings Bank, says he will furnish the money;' and he said, 'Don't do anything now;' and in a few days, he came in, and says, 'You go ahead and buy it, and I will furnish the money.' "

On cross-examination, he testified as follows:

"A. It was that he was to furnish the money to buy it with, and I was to place a loan for \$10,000, and he was to furnish the balance of the money, and we were to split half and half, taking out all of the expenses. There was no time set when this partnership should stop. I was to furnish the loan of \$10,000, if we got it. I says, 'I am quite sure, Dave, I can get \$10,000.' * * * I was to pay interest on half that he would pay in. I would pay interest on half, and him pay interest on half. I was to pay interest on the money he should furnish, half of the money that I should furnish from the loan, and Mr. Lightner half the interest. In other words, all of the interest was to be taken out of the proceeds of the rentals of the farm, the taxes, insurance, and interest, and he was to keep track of it. I was to buy the farm in my name,—not in his name. The interest and the taxes and insurance was to be paid out of the profits, and if

there were any profits, he was to take them out of the profits when we settled. * * * *If there were no profits, he was to put up the money; I wasn't to put up any money. He was to put up the money.* We discussed that before I bought the farm. * * * Of course we bought it for speculation. I bought the farm with the express purpose of selling it. Some day after that, when we sold it, we were to divide the profits, after taking out the expenses. After I failed to make the loan, I expected Lightner to pay the expense. If I got the loan, there was to be no commission. I expected to pay the commission *out of my share of the profits.* I told Lightner, I says, 'If I can't get a loan, and you have to get it, it *will come out of the profits.*' I said, 'If I fail to make the loan, and we had to make it through someone else, that whatever was paid out there *was to come out of my share of the profits.*' Lightner was to take care of all expenses. He was to pay the interest. On this commission on the loan that I couldn't make, and that I was having to pay commission on, Lightner was to pay that, and I was to pay him back *out of the profits.* That was my obligation in reference to that matter, that he was to take it *out of my share of profits.* The agreement was with regard to this one particular farm, the Simpson farm, this one particular piece of land."

Re-direct:

"In reference to my testimony that the agreement related to this one particular piece of land, I meant the amount of money that was involved in it. If we traded for another piece of land, it was to be handled in the same way. That agreement was to be continued until we closed up. No, the commission on the loan, if I couldn't make it myself, and we had to make it through some other agency, I was to pay the commission on the loan."

On recross-examination, McCarney testified as follows:

"I claimed that the Dallas County land was my land.

I did not tell anybody that it was Lightner's land. I told them that that was my land."

The substance of the testimony of the defendant on the main issue was as follows:

"I recall Mr. Referee giving notice of this sale. I don't think he set a time for bids. After Joy was appointed referee, I met Mr. McCarney at his office. He wanted to know why I didn't buy the land. I told him it wasn't the kind of land that I would like, and another thing, I didn't have the money to handle this land; that it must be all cash, and that I couldn't handle it; that there was nothing against the farm, and that I couldn't handle it. At the first conversation, I don't know what he said; he talked to me several times about this land, and kept telling me that the land was worth the money. The land had been priced at the time at \$90, and he said the land was worth a lot more than that, and that he could sell the land for \$115 or \$125 per acre, in a reasonable time. I told him that I didn't think it was worth that money,—that I didn't believe he could get that much; and he kept telling me it was; and finally he says, 'I can get a loan of \$10,000 on that land;' and I told him, I says, 'I don't believe you can get that much money on it.' 'Yes,' he says, 'I am a loan agent, and I know that I can;' and finally I made him a proposition. I told him that I would buy the land, provided I could buy it around \$90, if he could get a loan of \$10,000, or even \$9,000; that I could handle it, if he could get that much money. I told him that I would buy the land, and, if he could sell the land before settlement day, the 1st of March, that I would give him half the profits on the land, and if he did not sell it, he was to furnish me a loan of \$9,000 or \$10,000 at 5 per cent interest, and not charge me any commission for getting it. He said he would do that. * * * My proposition was that he was to dispose of it before the 1st of March following the time that he purchased it, and

he could have half of the profits. It was my intention to absolutely dispose of it before the 1st day of March. I don't know that it had to be sold, but that was the talk about it * * * If it wasn't sold, I could take it over and settle for it. We had that agreement. McCarney wasn't to get a cent for it if he did not sell it before the 1st of March. He wasn't to charge me anything for getting the loan of \$9,000 if he didn't sell the farm before settlement time."

Much of the corroborating evidence offered by both parties is not very significant. As against the plaintiff, evidence that, in his attempt to negotiate a sale, he referred to the land as Lightner's, or evidence in his favor that he used the plural pronoun, and referred to the land as "ours," is not persuasive in either direction. Either form of speech might be deemed consistent with the customary methods of agents, while representing their principals.

It will be seen from the foregoing that the issue of fact between the two parties as witnesses is quite definite. The plaintiff contends that a partnership was formed, and that the land belonged to the partnership, and one half thereof to him, as one of the partners; whereas, the defendant claims that they had a simple agreement, whereby the plaintiff, as a land agent, should receive half the profits as his commission, in the event of sale before settlement day, March 1st. The vital question in the case is, Was there a partnership? Before proceeding to a discussion of the evidence as bearing on that question, we should deal with a preliminary motion filed by the appellee for a dismissal of a branch of this appeal.

I. At the trial below, when the plaintiff rested, the court directed that he would hear the evidence first on the question of the existence of a partnership, and that

1. **APPEAL AND
ERROR :**
intermediate
orders (?) or
final judg-
ment (?)

he would decide that question before the labor of an accounting should be undertaken. Over some objection by the defendant, this was the course appropriately adopted by the trial court. This issue was submitted, and

the cause continued in other respects. Thereafter, in November, 1917, the trial court entered upon its calendar a general finding that the equities were with the plaintiff. Later, on January 26, 1918, this calendar entry was entered upon the journal, and included in the record signed on that date by the judge. Pursuant to the November finding of the trial court, an accounting was had, and a final judgment was rendered against the defendant. Appeal was taken from the final judgment within six months, and within six months from January 26, 1918. The motion is to dismiss the appeal as to the finding of partnership. The ground thereof is that the appeal was not taken within six months from November 20, 1917, the date of the calendar entry.

The order of November 20th was not a final judgment. Assuming, without deciding, that it was such an interlocutory order from which appeal could have been taken, under the statute, no appeal was taken. While

2. **APPEAL AND
ERROR :**
calendar entry
(?) or final
judgment (?)

our statute permits appeal in cases from certain intermediate orders before final judgment, we have always held that the litigant is not compelled to appeal before final judgment.

in order to save his right of review. He may save his exceptions, and await the final judgment and appeal therefrom, and may thereby obtain a review of all rulings properly excepted to which lead up to the judgment. *Jones v. Chicago & N. W. R. Co.*, 36 Iowa 68; *Miller v. Kramer*, 148 Iowa 460; *Lesure Lumber Co. v. Mutual Fire Ins. Co.*, 101 Iowa 514; *Mueller Lumber Co. v. McCaffrey*, 141 Iowa 730. 735. To the foregoing it may be added that the entry upon the calendar of November 20th was not a judgment from

which appeal could have been taken. Only the journal entry could be deemed such judgment. An appeal within six months from January 26th, therefore, would have been in time, even if it had been necessary to take the same within six months from the entry of the order.

II. Does the record herein disclose a partnership? The averment of partnership of two parties may be established as to third parties by circumstances and inferences fairly warranted by the attitude of the alleged partners toward the public. In other words, they may be found to be partners as to third parties, though they were not, in fact, such as between themselves. When, however, the question is an issue between the alleged partners themselves, one affirming and the other denying, the court must ascertain the terms of the very agreement entered into, as a matter of fact, and the effect of such agreement as a matter of law, in order to determine whether it constitutes a partnership.

The essential requisites to constitute a partnership are few and definite. One of these is that the agreement entered into must contemplate a sharing of both profits and losses. There are many relations out of which agreements for a sharing of profits may arise, which are not deemed partnerships. Persons may be associated as joint owners of real estate, and may co-operate in realizing profits therefrom, and yet not be partners. Such a case was *Munson v. Sears*, 12 Iowa 172. To quote from the opinion in that case:

"A partnership agreement is, where two or more persons join together their money, goods, labor, and skill, or either or all of them, for the purpose of advancing a fair trade, and of dividing the profits and losses arising, proportionably or otherwise, between them. * * * Partnership is a contract of two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in

3. PARTNERSHIP:
profits and
losses: land
deal.

lawful commerce or business, and to divide the profits and bear the losses in certain proportions. * * * To constitute a partnership in a particular purchase, or in a single transaction, there must be an agreement to share in the profit and loss. In this contract, it was agreed to share ultimately any profit and loss. There was no investment of a partnership fund; no agreement that any business should be carried on in a firm name. The parties had no previous partnership or connection with each other in trade; and no intendment can be made in favor of a partnership, so as to supply the absence of fact."

Persons may be the joint owners of personal property, and may co-operate in the use of the same, and realize joint profits therefrom, and yet not be partners. Such was the case of *Iliff v. Brazill*, 27 Iowa 131, the parties thereto being joint owners and operators of a threshing machine.

An agreement for a share in the profits of a business or transaction, as compensation for services to be rendered, does not constitute a partnership. Such were the cases of *Holbrook & Bro. v. Oberne*, *McDaniel & Co.*, 56 Iowa 324; *Winter v. Pipher & Co.*, 96 Iowa 17; *Porter v. Curtis, Morris & Diver*, 96 Iowa 539; *McBride v. Ricketts*, 98 Iowa 539; *Haswell v. Standring*, 152 Iowa 291; *Goss v. Smith*, 178 Iowa 348. In *Haswell v. Standring*, 152 Iowa 291, a case was presented wherein the facts and circumstances supporting the claim of partnership were overwhelmingly greater than is found in the case at bar. But we held that there was no partnership. That was a case, too, where the claim of partnership was put forward by third parties, who had been misled and defrauded by an assumption of authority on the part of one of the alleged partners. That case also involved the purchase and sale of real estate, for the purpose of speculation, wherein one furnished the money and took the title, and wherein the other did the entire business of purchasing, renting, and selling. The

title holder was a nonresident, and had never seen the land in question, and had never exercised any judgment or discretion of any kind as to the purchase or the sale thereof, but had left the matter solely to the purchasing agent, who was to receive half the profits. We held the case to involve only an agreement for a sharing of profits.

To quote from the opinion therein:

"Under the rule in this state, the mere showing of profits does not create a partnership. An essential element of the relation is the obligation to share losses, also. * * * It is not necessary that there be an express agreement to share the losses of the venture. Such an agreement may be inferred from other provisions of the contract, 'the nature of the business, and the relation of the parties to the business to be transacted.' * * * The contract between the plaintiff and Standring was that the latter should buy land for the plaintiff, guarantee the plaintiff interest on the money he so invested, and have one half of the net profit when the land was sold. In this case, the evidence shows that the annual rent from the land about paid the plaintiff 6 per cent interest on his original investment, and the taxes on the land; so that Standring was entitled, under the contract, to one half of the amount it sold for above the original price. There is nothing in the contract, or in the nature of the particular transaction, tending even to show an agreement to share losses."

In *Goss v. Smith*, 178 Iowa 348, there was a written contract for a division of profits between the title holder of the land and the land agent who was instrumental in the acquisition of the land by the landowner. Prior to the litigation, the agent claimed an interest in the land as a partner, but such claim was not put forward for him by his counsel in the litigation. The facts of the case, however, illustrate the natural tendency to claim an interest in land as a partner by a profit-sharing beneficiary.

Appellee places special reliance upon *Richards v. Grinnell*, 63 Iowa 44. The cited case furnishes no real aid to the plaintiff. The case was tried on a demurrer to a petition. The petition alleged a partnership, but did not allege specifically that there was an agreement for sharing profits and losses. All that this court held was that the averments of the petition, being taken as true, were sufficient averments of partnership. The obligation to share losses would be implied. There is no holding that the averments of the petition could have been sufficiently proved, without showing an agreement which, either expressly or impliedly, provided for the sharing of losses.

In the case at bar, we have the evidence of each party, and his version of the agreement. The testimony of the plaintiff himself is definite and emphatic, that he was "not

to put up any money." Whatever was to be charged against him was to be taken out of his profits. As far as he was concerned, only profits were contemplated. If there

4. BROKERS:
principal and
agent (?) or
partners (?)

had been no profits, there would have been nothing against which loss could be charged as to him. Accepting this fact as testified to by him, it would have been a complete defense to any claim against him by Lightner for a contribution in the payment of losses. The case is, therefore, readily classified as an agreement for a share of the profits, as compensation for his services as agent in the purchase and proposed sale of the property. There was no partnership, in a legal sense, as between the parties. No equities of third parties are involved. If there was no partnership, then plaintiff had no interest in the land as such. The claim of partnership constitutes his only avoidance of the statute of frauds. The defendant held his title to the land by warranty deed from the plaintiff. He paid all the purchase money, the plaintiff paying no part thereof. There was, therefore, no resulting trust. In the absence of part-

nership, therefore, the defendant's title is absolute and unimpeachable. In so far, therefore, as the oral evidence introduced by plaintiff tends to impress a trust in his favor upon the real estate, it must all be disregarded as incompetent, under the statute.

III. It remains to consider whether anything can be found for plaintiff upon his prayer for general relief under the qualified agreement for a sharing of profits, as admitted

by the defendant. In passing upon that question, it is doubtful whether we can consider any other evidence than that of defendant. The testimony of the plaintiff is so interwoven with incompetent evidence, introduced for the purpose of showing an interest in the land, that it is difficult, if not impossible, to pick therefrom any competent evidence conflicting with that of the defendant.

The evidence for the defendant is that the profit-sharing agreement contemplated only a case of sale of the property on or before settlement day, March 1st, and while the contract of purchase and equitable title was in the name of McCarney; that the scheme failed, in that they were unable to sell by such time, either with or without a profit; and that the profit-sharing enterprise was terminated by the transfer of the property from McCarney to Lightner, and the payment by Lightner of the full purchase price. Assuming that this position of the defendant is contradicted by competent evidence of the plaintiff that the enterprise was to continue and apply to successive transactions, we proceed to consider the corroborations of the respective contentions to be found in the circumstances surrounding the parties, and in their mutual conduct. In weighing the testimony, the plaintiff starts at a disadvantage. His testimony on that question is in the form of conclusion. The actual conversation testified to by him does not support it.

5. BROKERS :
profits as
commission :
termination
of contract.

The evidence shows that this trade resulted in a net loss to Lightner of not less than \$300. Upon the consummation of this trade, there was no claim of profit by McCarney, nor offer to pay loss, nor was there any offer to pay any part of the boot money, or to take any interest in the automobile; nor was there any demand by Lightner upon McCarney for any of these things. Lightner expended \$100 in repairs upon the automobile, and then sold it for \$800. There was no consultation of any kind between him and McCarney on the subject. McCarney testified that he got none of the commission, but that it all went to the agents of Stout. The check for commission was signed by Lightner, but drawn by McCarney. No reason appears in the record why Lightner should pay the agents of Stout, or why his check should go to them, except upon the theory that the agents for the two parties had pooled their commissions. There is no doubt, upon this record, but that Lightner believed that McCarney got his share of the commission, and that McCarney knew that Lightner so believed. Nor are we convinced that McCarney did not get a share of this commission. Unless he got the same, there was no occasion for Lightner's paying a commission at all. If they were still operating under the profit-sharing scheme, then it was McCarney's part to accomplish the sale without a commission. If they were not operating under the original scheme, then Lightner would be liable for a commission. McCarney's explanation is that he was standing this commission himself: that is to say, it was to be charged against his share of the profits. But there were no profits; and, if there had been, not the slightest attempt was made by McCarney to ascertain the amount thereof. But we proceed. The plaintiff pleaded in his petition that, after the acquisition of the Stout tract, the defendant ignored him, and failed to consult him. Lightner assumed full control of the Stout land; he expended moneys in making improv-

ments thereon; he rented and collected the rents; within a year or two, he traded this land to Roper. In the same manner, he took full charge of the Roper land. It must needs be rented, and terms of renting agreed on; improvements were made; insurance was carried; taxes were paid; clover and timothy seed was purchased; during a part of the time, the farm was rented for shares; the shares had to be received and marketed. All these matters were of vital interest to McCarney, if they were to enter into a computation of his profits. He had also the duty of sharing the burden of looking after these things, if he was to receive the compensation of profit sharing. In order to make the Roper trade, large boot money was paid. An agent's commission of \$250 was paid.- This was the method whereby the defendant "ignored" the plaintiff. There was no friction between the parties in regard to it. They saw each other frequently, and transacted other business with each other continuously. It is undisputed that, from the time of the Stout trade, and for a period of three years, McCarney did not interest himself at all in the management of either the Stout or the Roper farm. He made no inquiry about any of these matters enumerated, nor did he tender any assistance thereon. The significance of this conduct cannot be ignored. It was consistent with the conduct of Lightner. Their mutual conduct indicated the same understanding: that McCarney had no interest in the Stout or the Roper transaction.

The only possible question of fact open to debate is whether the profit-sharing enterprise terminated at the time of the settlement with the referee, and the execution of the deed from McCarney to Lightner, or whether it was continued to December, 1913, when the Stout trade was made. In view of the absence of profit in the Stout trade, the question is not a material one. We may say, however, that, in view of the payment of a commission by Lightner in the Stout trade, either to or through McCarney, and of

the fact that he traded at a loss the land that he did not wish to keep, and that there was never any consultation between him and McCarney as to the fruits of that trade, though their personal and business relations were undisturbed by any friction, we are satisfied that they both deemed the profit-sharing scheme to be terminated at the March settlement with the referee.

The profits sued for by the plaintiff were made by Lightner long subsequent to December, 1913, and arose out of phenomenal rise of land values, which occurred in the following years. McCarney contributed neither money nor labor nor counsel to any transaction out of which the profits were made. His claim rests, not upon any equity or *quantum meruit*, but upon the actual terms of the oral contract of August, 1912. A very careful study of this record satisfies us that the contract, in its subject-matter, was confined to the Dallas County land, and that the successive transactions subsequently had, did not at that time enter at all into the contemplation of the parties. Such contract cannot, therefore, be projected into them now.

If there was no express agreement as to the time of accomplishing the sale of the Dallas County land by McCarney as agent, then the law will imply that it must be done within a reasonable time. *Goss v. Smith*,

6. CONTRACTS :
performance :
failure to fix
time.

178 Iowa 348. Such a profit-sharing contract will not give to the selling agent a perpetual grip upon the property of his principal. He cannot bide his time indefinitely, and wait for rising values to give him large profits upon the sole investments of his principal. Under the operation of this rule, a reasonable time for the performance of this contract had elapsed long prior to the accrual of any profits to anybody.

We reach the conclusion that the contract pleaded by plaintiff is not proved, and that there is no equity in his bill.

The decree entered in his favor must, therefore, be reversed, and a decree entered here, dismissing his petition.—*Reversed.*

WEAVER, C. J., LADD, PRESTON, and SALINGER, JJ., concur.

W. A. RIDER, Appellant, v. V. S. HOCKETT et al.,
Appellees.

APPEAL AND ERROR: Abstracts. Maps and plats should be condensed or reduced.

Appeal from Adams District Court.—HOMER A. FULLER,
Judge.

FEBRUARY 16, 1920.

REHEARING DENIED MAY 11, 1920.

IN the district court, this was an appeal by plaintiff from an order of the board of supervisors of Adams County, establishing a drainage district. Trial being had on the merits, the district court confirmed the action of the supervisors. From such order of the district court, the plaintiff has appealed.—*Affirmed.*

Tinley, Mitchell, Pryor & Ross, for appellant.

A. Ray Maxwell and Meyerhoff & Gibson, for appellees.

EVANS, J.—The proposed drainage district is known in the record as East Nodaway Drainage District No. 2. Its purpose is to straighten a section of the East Nodaway River. It comprises about 4,000 acres of land, nearly all of which is subject to the periodical overflow of such river. The petition therefor was signed by nearly all the land-owners therein, including the plaintiff. Sometime prior to the filing of this petition, East Nodaway Drainage

District No. 1 had been established, and its improvement constructed. This also involved a straightening of a section of the same river. East Nodaway Drainage District No. 2, now under consideration, joins the District No. 1 on the upstream side, and the improvement is intended as an extension upstream of that which has been already accomplished in District No. 1. The ditch which is to be constructed under the present improvement is to have its outlet at and into the head of the ditch already constructed for District No. 1. Such outlet is located at the west end of the so-called Brooks Bridge, and extends upstream to the Nodaway Bridge. Between these two points, the sinuous length of the river is 14.7 miles. The length of the proposed ditch between these two points is 6.38 miles. The cost thereof will be approximately \$62,000, the contracts being already let. The original objections filed by the appellant before the board of supervisors, upon which he elects to stand in this court, were as follows:

First. The objectors state that said ditch, on the route recommended by said engineer, will not be a public utility.

Second. The cost of construction of the ditch, upon the route proposed by said engineer's report, would be excessive, and would be a greater burden than should be borne by the land proposed to be benefited by said improvement.

Notwithstanding this election of appellant to stand upon these original objections, he has argued in his brief some other contentions as to the procedure of the board, on the theory that they go to the jurisdiction of the board. If these questions could properly now be raised, we are clear that we should have to find against the appellant on the merit thereof, and on the facts upon which they are predicated. We shall not, therefore, pass upon the question as to whether appellant is entitled to be heard as to these. On the broad question of public utility and of proportion-

ate cost and benefit, we do not discover in the record any very marked conflict of evidence. The testimony is confined, in the main, to that of the engineers. The plaintiff himself was not a witness. Only one landowner was used as a witness on each side. Each side introduced the testimony of an engineer who had been upon the ground, and who presented, as a part of his testimony, maps and plats, including measurements and levels. The exhibits thus produced by the engineers have not been abstracted. Counsel have found it less laborious to stipulate the original exhibits to this court. There can be no objection to such stipulation; but it does not justify a failure to abstract the exhibits in reduced form for our convenience. The originals presented to us are wholly unsuitable for the purposes of an opinion. For that reason, it is impracticable for us to deal in this opinion with the details of the evidence, as bearing upon the merits of the case, and we shall content ourselves with a general statement of our conclusions.

If it could be said that there was substantial conflict in the testimony of the engineers, we should have to deem the circumstances shown strongly corroborative of the contention of the defendants.

It would seem to a nonexpert highly probable that water could be delivered between two points more rapidly over a 6-mile course than it could through the curves of a 14-mile course, it appearing, indeed, that the total curvature of this latter course describes a circle 37 times between such two points.

The engineer who testified on behalf of the appellant was Ballard. He was the official engineer of a railroad company whose line of road ran along the course of this stream. He testified as follows:

"The present channel does not take care of all of the ordinary, heavy rains. Something must be done there. The necessity for this drainage district is apparent. The only

difference between Mr. Price and myself is with reference to the location of the ditch. I am very much interested in that ditch being located close to our tracks. I am deeply interested from the standpoint of the company. In many places, the river bank itself, and in some places, the river bed itself, is higher than the ground back from it. There is a limited area that don't drain now. It is necessary to have either tiling or laterals, in either case. The mark which I have made with a pencil on Exhibit A-1 is the ditch as I think it should be. There would be but slight difference, so far as the cost is concerned, between Mr. Price's ditch and the one proposed by me. I presume there would not be any."

As an engineer, he contended only for a slight change of location of the ditch from that recommended by the other engineer, Price. The variance between the two plans was less than 100 feet in distance, and none in cost. It is shown that the land in the valley is in the main level. The overflow spreads out to a width of three quarters of a mile. Manifestly, therefore, more than one line of location for the ditch might plausibly be selected. That a cut-off ditch of some kind, located on some line between the two points in question, should be established, is virtually conceded, upon the record. The fact that one line of location would better suit the convenience of one landowner, and that another line would better suit the convenience of another, is an unavoidable incident of such an improvement.

We are very clear that the evidence in this record would not justify our interference with the finding of the district court, confirming the action of the board. The order entered below is, therefore,—*Affirmed*.

WEAVER, C. J., PRESTON and SALINGER, JJ., concur.

STATE OF IOWA, Appellee, v. EARL BOGARDUS et al., Appellants.

ROBBERY: Evidence—Sufficiency. Evidence held to present jury
1 question as to defendant's guilt.

INDIOTMENT AND INFORMATION: Amendment. An indefinite
2 allegation of the ownership of property may be made definite
by amendment.

CRIMINAL LAW: Verdict-urging Instructions. Instructions urg-
3 ing upon the jury the desirability of a verdict are not objec-
tionable when nothing coercive appears from the language
thereof, or from the actions of the jury.

CRIMINAL LAW: Separation of Jury. A slight separation of
4 jurors, concededly without prejudice, cannot be denominated
reversible error.

Appeal from Jefferson District Court.—C. W. VERMILION,
Judge.

FEBRUARY 16, 1920.

REHEARING DENIED MAY 11, 1920.

DEFENDANTS were tried, and found guilty of the crime of robbery. Judgment was pronounced that one of them be imprisoned in the penitentiary at Fort Madison, and the other in the reformatory at Anamosa. The defendants appeal.—*Affirmed.*

Jaques, Tisdale & Jaques, for appellants.

H. M. Harner, Attorney General, *Charles W. Lyon*, Assistant Attorney General, and *Richard C. Leggett*, County Attorney, for appellee.

PRESTON, J.—Four grounds are relied upon for reversal. Briefly, they are: The alleged insufficiency of the evidence; that the court permitted an amendment to the

1. ROBBERY:
evidence:
sufficiency.

indictment; the giving of an additional instruction; and lastly, that the jury were permitted to separate while deliberating on their verdict.

1. It appears that, on Sunday night, August 11, 1918, at about 10:30 or 11 o'clock, an automobile, driven by one Peacock, in which Clarence Faulds and Verdie Hoskinson, the prosecuting witnesses, and one Barker were riding, was held up by two masked men, one tall, the other small. Faulds was robbed of a gold watch and \$90 in money, and Hoskinson of a diamond ring. The robbery took place at a bridge between Fairfield and Ottumwa, three miles east of Fairfield. No question is raised about the robbery's having been committed. The evidence will not be stated in detail. The acquaintance of the witnesses with defendants, the manner in which the robbers were dressed, the presence of the different ones in Fairfield, and other details, are given. After the robbery, Barker, Faulds, and Hoskinson were compelled to descend into the ditch near the bridge, and Peacock was compelled to turn his car around, and drive the robbers back east towards Fairfield. When the robbers reached a Ford car, which the occupants of the Peacock car had noticed standing at the side of the road, as they went west, they alighted, and got into their car and went on east. Peacock and a boy went back and met the other three victims, walking towards Fairfield. The victims had, in the meantime, telephoned to the sheriff. Faulds testifies that he recognized the two defendants as the parties who held them up that night. He testifies that Connell was in the restaurant when he had supper, before the robbery, and that Connell saw what witness had in his pocketbook. He testifies that he had met defendants and others in a crap game, two weeks before, and Bogardus in another crap game, the afternoon before the robbery. He heard Bogardus talk, and noticed that he talked through

his nose. He had seen Connell two or three times. At the crap game in the afternoon, Peacock said he was "broke," and Bogardus was trying to get some money. Before the robbery, he saw a couple at the side of the road, with the reflection from the Peacock light. The robbers had guns and a flash light, one on each side of the auto. One was a tall, slender fellow, stoop-shouldered; had on a long tan or sheepskin coat. The other had on a pair of overalls, which were too large for him. The small man had a small automatic gun, and the other a large one. The small man walked up to witness, put his gun into witness' ribs, as he puts it, and went through him, but couldn't find his pocketbook. They first said, "Get that watch;" and witness gave them his watch. They got \$4.00 or \$5.00 in silver that witness had in his pocket, but they did not seem to be satisfied, and they went through witness two or three times; couldn't find the pocketbook. The big fellow said, "Got it all?" and the other said, "No." They went through him again, and the larger man told the smaller to look in the back seat of the car, and they found the pocketbook. He recognized Bogardus by the way he talked, through his nose; also, by the way he was dressed. Bogardus did most of the talking. The other man was small, and he could tell when he went through him. This witness is corroborated by Hoskinson, who testifies of a crap game, that morning and afternoon, at which Bogardus was present,—at least at the first game. Witness saw Faulds have some money in his possession that afternoon, and a gold watch. Witness had a diamond ring, and some money, at the game in the park. Later, he went to a restaurant, and saw both defendants. Hoskinson says he had known Connell for 10 or 12 years; had met him when he was going to school in Fairfield, and had seen him since, in Ottumwa, and Fairfield.

The State's witnesses are contradicted by witnesses

for the defendant. Peacock says that neither of the robbers were the defendants. His evidence was considerably shaken on cross-examination, and the State contends that the diamond ring which was taken from the finger of Hoskinson proved to be the undoing of Peacock on cross-examination. There is evidence of a telephone call by Peacock, from Chicago, to Connell, and of the going to Chicago of Connell and Bogardus. We shall not go into the details of this transaction. The jury had it all. He testifies as to his intimacy with Connell, and about losing a diamond ring in a cabaret in Chicago; about its being in pawn, and about different girls' wearing it. He tries to make it appear that the ring he had was not the one taken in the robbery. He testifies about seeing Faulds and Hoskinson at the crap game on the afternoon of the day of the holdup, and that he took part in the game. He says:

"I didn't notice these two boys any more than any of the other boys. I walked down the railroad with them. Well, there wasn't much talk about crooked dice. They simply mentioned they had a pair of shapes, and if there was any suckers around town, we could trim with them. We didn't say anything. We were about as smart as they were, when it comes to shooting craps. I don't know as we were any better. I don't think they could learn us anything about shooting dice."

Barker says that neither of the robbers looked like the defendants.

The mother and brother of Bogardus gave testimony, tending to establish an alibi for him, and say that he was at home, about 10 or 11 o'clock that night. A waitress at the cafe thinks Connell was in the restaurant all the time from 8 or 9 o'clock in the evening until after the holdup.

Without going into details, this is a brief summary of the evidence. A number of people were in the restaurant, and the waitress may have been engaged in her duties,

and not noticed particularly any particular person continuously for two or three hours. Evidence as to alibi is not always trustworthy, when given by relatives, and when they do not attempt to fix the time accurately, or within an hour or so, as in this case. Defendants do not state where they were. They were not witnesses. The credibility of the witnesses and the weight to be given to their testimony as to the identification of defendants are sufficient to sustain the finding of the jury.

2. The indictment, as originally drawn, omitting caption and signature of the county attorney, is as follows:

“The grand jury of the county of Jefferson, in the name and by the authority of the state of
2. INDICTMENT AND INFORMATION : amendment. Iowa, accuses Earl Bogardus and Fred Connell of the crime of robbery, committed as follows:

“The said Earl Bogardus and Fred Connell, on or about the 11th day of August of the year of our Lord 1918 in the county aforesaid, did, by force and violence and by putting in fear, steal and take from persons of Verdie Hoskinson and Clarence Faulds, property that is subject of larceny, to wit, one gold watch, one diamond ring, and \$90 lawful money of the United States, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state of Iowa.”

The county attorney was permitted to amend the indictment in regard to the ownership of the property, as follows:

“Which said gold watch and \$90 lawful money of the United States were then and there the property of and owned by the said Clarence Faulds, and which said diamond ring was then and there the property of and owned by the said Verdie Hoskinson.”

The thought of appellant is that the indictment, as originally returned, charges, and is a good indictment for,

assault with intent to rob, and that, in such an indictment, it is not necessary, under the holding in *State v. Gulliver*, 163 Iowa 123, to allege the ownership of the stolen property. They argue, too, that an assault with intent to rob is a degree of the crime of robbery. They then argue that the indictment, when amended, charges a different degree of crime from that charged in the original indictment, contrary to Section 5289, Code Supplement, 1913.

We think the argument is built up on the assumption that the indictment originally charged only assault with intent to rob. The original indictment does not specifically charge any assault, but simply charges that, by force and violence, and by putting in fear, the defendants did steal and take from the persons of Hoskinson and Faulds property, etc. It charges robbery, and the original indictment itself, we think, comes very near alleging the ownership of the property, and does so, by implication at least. The amendment does not charge a different crime or different degree of crime from that charged in the original indictment, but simply makes more specific the allegation concerning the ownership, which is expressly permitted in the statute before cited. We think this case, at this point, is ruled by *State v. Kiefer*, 172 Iowa 306.

3. After the jury had deliberated on their verdict about 30 hours, the court gave the following additional instruction:

“This case has been exhaustively and

3. CRIMINAL LAW: carefully tried by both sides, and at con-
 verdict- siderable expense, and has been submitted to
 urging instruc- you for decision and verdict,—not for disa-
 tions. greement. The law requires an unanimous verdict; and
 while this verdict must be the conclusion of each juror, and
 not a mere acquiescence of the jurors to reach an agreement,
 it is necessary for all of the jurors to examine the issues
 submitted to you with candor, and a proper regard and

deference to the opinion of each other. A proper regard for the judgment of other men will greatly aid us in forming our own. This case must be decided by some jury, selected in the same manner this jury was selected, and there is no reason to think a jury better qualified would ever be chosen. Each juror should listen to the argument of other jurors, with a disposition to be convinced by them; and, if the members of the jury differ in their views of the evidence, such difference of opinion should cause them all to scrutinize the evidence more closely, and to re-examine the grounds of their opinion. Your duty is to decide the issue of facts which has been submitted to you, if you can conscientiously do so. In conferring together, you should lay aside all mere pride of opinion, and should bear in mind that the jury room is no place for espousing and maintaining in a spirit of controversy either side of a cause. *The aim ever to be kept in view is the truth, as it shall appear from the evidence, examined in the light of the instructions of the court.* You will again retire to your jury room, and examine your differences in a spirit of fairness and candor, and try to arrive at a verdict."

The jury returned, an hour and a half after the giving of this instruction. The jury were not kept out so long after the giving of this instruction as to indicate coercion, and the fact that they deliberated an hour and a half afterwards shows that they were not coerced by the giving of it. In the *Peirce* case, *infra*, at 426, it was said that it seems to resolve into whether the relative time spent in deliberation may raise a presumption of prejudice against the instruction. Appellant cites the following cases, where a similar instruction was criticized: *Clemens v. Chicago, R. I. & P. R. Co.*, 163 Iowa 499; *State v. Mulhollen*, 173 Iowa 242; *State v. See*, 177 Iowa 316; *State v. Peirce*, 178 Iowa 417. The State cites the following cases to sustain the instruction: *State v. Lawrence*, 38 Iowa 51, 57; *State v. Hale*, 91

Iowa 367, 370; *State v. Olds*, 106 Iowa 110, 117; *State v. Tripp*, 113 Iowa 698, 708; *State v. Richardson*, 137 Iowa 591, 594; *Burton v. Neill*, 140 Iowa 141, 143; *State v. McGhuey*, 153 Iowa 308, 317; *State v. Jackson*, 156 Iowa 588, 598; *State v. Concord*, 172 Iowa 467, 476; *State v. Mulhollen*, 173 Iowa 242, 248; *State v. Levich*, 174 Iowa 688, 696; *State v. See*, 177 Iowa 316, 319; *Armstrong v. James & Co.*, 155 Iowa 562, 564; *Clemens v. Chicago, R. I. & P. R. Co.*, 163 Iowa 499, 506; *State v. Peirce*, 178 Iowa 417, 422.

We have seldom reversed for the giving of such an instruction. Some of the cases approve, without qualification, instructions similar to this; other cases criticize and disapprove, without reversing. The question has been fully discussed and the cases reviewed in the *Peirce* case, and we need not now repeat the discussion. In the instruction now under consideration, the trial court eliminated the language which was thought to be objectionable in some of the cases. For instance, in some of the cases, the instruction contained this language:

"Such difference of opinion should induce the minority to doubt the correctness of their own judgment," etc.

In the instant case, the court eliminated the objectionable language contained in the *Clemens* case, cited and relied upon by appellant. The *Peirce* case contained similar language. There were the further circumstances in the *Peirce* case, that three of the jurors stood for acquittal, when the instruction was given; it was late Saturday night, and it got into the jury room that the trial judge had gone home for Sunday. It was said that these circumstances fairly conveyed to the jury that failure to agree meant confinement over Sunday. The more recent cases are bottomed upon the case of *State v. Richardson*, 137 Iowa 591, 594, where a similar instruction was approved. See, also, *Armstrong v. James & Co.*, *supra*.

The record does not show how the jury stood at the time the instruction was given in the instant case. In the *Peirce* case, the jurors had been kept together 11 days, before entering upon their deliberations in the jury room, and there had been 48 hours of disagreement, before the instruction was given, and there was, as said, the further thought in the minds of the jurors of further confinement over Sunday. In the *Mulhollen* case, we said that there was a better reason for approving the instruction in the case than there was in the *Richardson* case.

We shall not discuss the different features and circumstances of all the cases cited on this point. Such an instruction is not always appropriate, and whether it shall be given is largely within the sound discretion of the district court; and the circumstances in this case are such as to bring it within the discussion of the case of *State v. Peirce*, supra.

4. Lastly, it is contended that there was misconduct of the jury, in that, after the case was submitted, one of them, while being conducted from the restaurant where the jurors had eaten their supper, entered

4. CRIMINAL LAW: a restaurant, while the remaining 11 proceeded along the street; and on another separation of jury.

occasion, the same juror, or one of the others, entered a livery stable, while the jurors were being taken past, and either fed his horses or unharnessed them. As we understand the record, it was the same juror who went into the restaurant and the livery stable. The affidavit of the bystander who saw the juror go into the restaurant does not name the juror. These facts were shown by the affidavits of the bystander and the affidavits of the juror. The juror says he went into the restaurant, and, on another occasion, to feed his team; that the bailiff was at the front entrance. Neither of the affidavits shows that the juror spoke to anyone, or that anyone spoke to

him. The affidavit of the bailiff states that he had personal charge of the jury when they were at their meals, at the times in question; that he accompanied them when they left the restaurant, and returned with them to the court house; that, if the juror entered the restaurant, it could not have been for more than a minute, and did not delay the return of the jurors to the court house; that, when the juror went into the barn to feed his horses, he remained within sight and hearing of all the jurors, and that it took but about five minutes, during which time none of the jurors communicated in any manner with any person other than the members of said jury; and that no person at any time, during the deliberations of the jury, or in any manner, communicated with the jury, to his knowledge. All the jurors, including the one before mentioned, filed an affidavit, in which they say that they did not, in any manner, communicate with any person other than the members of the jury, during their deliberations, or at any time from the time they were sworn until after the verdict, with respect to or in any manner concerning any of the things related to or connected with or in any manner concerning said cause. It is contended by appellants that the matters complained of violate Section 5387 of the Code. Appellants say that, by the separation of the jury, as shown, opportunity for prejudice existed. They say that they do not know what took place in the restaurant or livery barn, but say that the affidavits show that the jury were not kept together, while deliberating on their verdict. Appellants also make this concession, in argument, that they do not claim to have shown any prejudice on account of these acts. No cases are cited by appellants.

We have a case, then, where no prejudice is shown, and that fact is conceded by appellants, and the record shows affirmatively that there was no prejudice. There was no reversible error at this point. *State v. Wart*, 51 Iowa

587, 589; *State v. Wright*, 98 Iowa 702; *State v. Lindsay*, 161 Iowa 39, 43; *State v. Cowan*, 74 Iowa 53; *State v. Griffin*, 71 Iowa 372; *State v. Fertig*, 84 Iowa 79; *State v. Bowman*, 45 Iowa 418.

No reversible error appearing, the judgment is—*Affirmed*.

WEAVER, C. J., concurs in the result. EVANS, J., concurs. SALINGER, J., concurs specially.

STATE OF IOWA, Appellee, v. GEORGE E. BROWN, Appellant.

CRIMINAL LAW: Verdict on Circumstantial Evidence. Circumstantial evidence in support of a charge of assault with intent to murder reviewed, and held insufficient to meet the rule that such evidence must be consistent with guilt, and inconsistent with any rational theory of innocence.

Appeal from Mahaska District Court.—H. F. WAGNER, Judge.

MAY 11, 1920.

THE defendant was indicted upon the charge of assault with intent to commit murder, and pleaded not guilty. On trial to a jury, he was convicted of the lesser included offense of assault with intent to inflict great bodily injury, and from the judgment entered on the verdict, he appeals.—*Reversed*.

Thomas J. Bray and *John E. Lake*, for appellant.

H. M. Harnier, Attorney General, *M. W. O'Brien*, County Attorney, *C. W. Lyon*, Assistant Attorney General, and *James A. Devitt*, for appellee.

WEAVER, C. J.—The defendant, George E. Brown, and complaining witness, Addie Brown, are husband and wife.

They were divorced in 1916, but within a few months married again. Their reconciliation was temporary only, and differences again arose between them. In February, 1919, they separated, the wife refusing to live longer with her husband. In March, 1919, she brought suit for a divorce. About the same time, defendant caused the arrest of his wife, on charge of adultery. The record does not show what became of these legal proceedings, but it may be inferred that the criminal charge was dropped or dismissed. It appears that, during March, defendant sought out his wife, on two or more occasions, to persuade her to resume family relations. At one of these meetings, according to her story, he had a 38 revolver in his hand, and said to her that, if she refused to live with him, she should never live with any other man. She does not say, however, that he used the weapon in a threatening manner. They were then living in the town of Fremont, where plaintiff was employed as a telephone operator.

On Sunday, March 31, 1919, defendant was also in town. At about 10 o'clock on the evening of that day, Mrs. Brown and her co-employee, Miss White, closed the telephone office, and retired for the night in an adjoining room occupied by them. They slept in the same bed. Shortly after retirement, it is alleged that two shots were fired through or from the door of their room, in the direction of the bed. The women gave an alarm, and called in two or three persons, who at first discovered no traces of the alleged assault; but there is evidence that, on the following morning, two 38-caliber bullets were found, one being imbedded somewhat loosely in the wall of the room; and there was a mark or bruise upon the bedstead, indicating, as the witnesses assume, the line of a bullet's flight from the door, a few inches above the bed. The second bullet, it is claimed, had penetrated some of the clothing, hanging upon the frame or post of the bedstead. Earlier in the

evening, defendant arranged with an auto driver to take him to Ottumwa. They left Fremont about the hour of 11:30 P. M. No one saw the shots fired, or claims to have personal knowledge of the identity of the perpetrator. In leaving the car at Ottumwa, defendant asked the driver not to say anything about where he (defendant) was going, or about his leaving town. A hardware merchant produced by the State testified that, about the 15th of March, defendant came to his store, seeking to purchase cartridges of 32 caliber. Another witness testifies that, at some time and place which he cannot or does not specify, defendant said to him that he was "going to wake them up over there, one of these nights," but, on being particularly questioned, he answered, "I don't know who he was going to wake up. He didn't tell me who he was going to wake up;" but says he later reported the language "to the girls," Mrs. Brown and Nell White. By another witness, it was shown that defendant had said he "could get into the telephone building if he wanted to."

The foregoing is the substance of the case made by the State's evidence.

The defendant, as a witness, denies that he made the assault, or fired the shot, or had anything whatever to do with the alleged offense, and suggests that the charge has been "framed," to get him out of the way, or to aid his wife in getting a divorce. He admits that, at one time, he had owned a 38 revolver, but says he had traded it off, a month before the alleged shooting, and that, on the day in question, he was wholly unarmed, and that, on the evening of the shooting, he went to the garage, about 9:30 P. M., to arrange for a ride to Ottumwa, where he had employment. The proprietor of the garage was expecting a call to Ottumwa, later in the evening, and it was arranged that defendant should go with him. Except for a few minutes' absence, to go to a stable, where a horse owned by him was being

kept, he remained at the garage practically all the time until the driver was ready to start to Ottumwa. His statements as to where he was from 9:30 P. M. until he left for Ottumwa are corroborated, to a material extent, by the garage man. Several citizens of the place testify to his general good character as a peaceable and law-abiding person, and his standing in this respect is not denied or impeached by the State.

Various exceptions have been presented to the rulings of the court in the course of the trial, but the one controlling exception taken is to the sufficiency of the evidence to support the verdict.

The most which can be said of the showing made by the State is that the jury could have found therefrom that appellant *could* have fired the shots, and that the inharmonious relations between him and his wife *may* have led him to the act. But something more than this is needed to sustain a finding that he *did* do it. No witness saw him in the act. If he is convicted and punished, it must be upon the circumstantial evidence alone; and these circumstances, as a whole, must not only be consistent with the conclusion of his guilt, but must be inconsistent with any rational theory of his innocence. It is not enough that they justify a suspicion of his guilt, but they must be such as to convince the impartial mind, to a moral certainty, of guilt. The case made by the State does not measure up to this standard. Defendant's presence in town on that evening is, in itself, of no special significance. It was his home. His trip to Ottumwa has no necessarily unfavorable significance. He swears he had obtained employment there, to begin on the following morning, and this is not denied or disproved. There was nothing furtive about his errand to the garage, or his stay there practically all the evening, until the driver was ready to start for Ottumwa. It may be possible that he had opportunity to make

his way into the telephone building, had he been so minded, but the same would be said of any other person in or about the town at that time. There is no evidence that he was armed. The fact that he had, at some former time, owned a 38 revolver, though doubtless admissible, is, of itself, no evidence that he had it on his person on this occasion. His purchase or attempted purchase of 32-caliber cartridges, two weeks or more before that time, not only has no tendency to show that he fired the 38-caliber bullets used in the alleged assault, but the inference, if any, to be drawn therefrom is in his favor. His request to the auto driver (which he denies) to say nothing of his trip to Ottumwa may or may not be unfavorable to him, though, standing alone, it is of little significance. There is no claim or suggestion that he sought to flee the country. The evidence of the witness Baccus, that defendant said to him that "some night he was going to wake them up over there," is hardly worth considering. He fixes neither time nor place; says he does not know what or to whom the defendant referred, or what he meant by "waking them up." His testimony is of that vague, uncertain kind which seems to imply something, but says nothing; and no amount of examination and cross-examination by counsel on either side was of any avail in extracting from him a grain of definite information.

Moreover, we think it is a circumstance of some weight, though, of course, not controlling, that the jury acquitted the defendant of any intent to murder or commit manslaughter, and convicted him only of intent to inflict great bodily injury. If anybody committed the alleged assault with a deadly weapon like a revolver, fired at the sleeping form of a human being, he intended murder, and nothing else; and the verdict is hardly explicable, except on the theory that the jurors were impressed with the State's failure to establish the assault with intent to murder, and

they realized the consequent necessity for an acquittal therefrom, yet convicted him of the lower included offense, out of regard for the lingering suspicion in their minds that, if all the facts could have been developed in evidence, he might have been found guilty of the more serious crime.

But, disregarding this somewhat anomalous feature of the verdict, and treating it as if returned upon an indictment directly charging assault with intent to inflict great bodily injury, we are still of the opinion that the record is insufficient to justify a conviction, and the judgment appealed from is, therefore,—*Reversed*.

EVANS, PRESTON, and SALINGER, JJ., concur.

STATE OF IOWA ex rel. LILA MCKEEVER, Appellee, v.
THOMAS E. CAREY, Appellant.

BASTARDS: Evidence—Sufficiency. Evidence held sufficient to sustain a verdict of guilty, in bastardy proceedings.

SALINGER, J., dissents.

BASTARDS: Proof of Intercourse. The fact of sexual intercourse may be established by the uncorroborated testimony of the prosecutrix.

BASTARDS: Instructions—Presumption of Innocence. It is not necessary to instruct, in bastardy proceedings, that defendant is presumed to be innocent.

BASTARDS: Instructions in re Alibi. Instructions reviewed, and held to properly confine the jury to a consideration of the one act of intercourse testified to by prosecutrix, and to justify the refusal of an inferential instruction on alibi.

SALINGER, J., dissents.

TRIAL: Assumption of Fact. An assumption by the court of the truth of an undisputed fact is proper.

NEW TRIAL: Excessive Verdict. Verdict for \$2,250 in bastardy proceedings held nonexcessive.

Appeal from Cass District Court—O. D. WHEELER, Judge.

MAY 11, 1920.

ON December 19, 1917, the relator filed a complaint against the defendant, charging him with being the father of her illegitimate child. Trial to a jury. Defendant was found guilty, and judgment entered against him, from which he appeals.—*Affirmed.*

Tinley, Mitchell, Pryor & Ross, H. M. Boerman, and C. B. Clovis, for appellant.

B. A. Goodspeed and Thomas Whitmore, for appellee.

PRESTON, J.—The complaint charges that, on October 29, 1915, defendant had sexual intercourse with relator, and, as a result thereof, she became pregnant, and that, thereafter, and on July 26, 1916, and within the period of gestation, a male child was born to her. Judgment was asked to provide a fund, out of which to support said child. For answer, defendant denied that, on said date, or at any time, he had sexual intercourse with relator; denies that he is the father of the child.

1. Appellant challenges the sufficiency of the evidence to sustain the verdict. In 1912, plaintiff came to Cass County, Iowa, from Illinois, with her unmarried brother, 46 years of age. She kept house for her brother, on the farm where they were living at the time of the alleged transaction. On the date in question, relator was 36 years of age. Their residence was a quarter of a mile south of defendant's home. In 1912, defendant's wife and young boy called on relator and her brother, and relator returned the call. Relator testifies that thereafter, at the suggestion of Mrs. Carey, she took her washing to Carey's house, and they did their washing together, because Mrs. Carey had a

washing outfit, and relator had been doing her washing by hand; that they washed that way for a year and a half or two years, and plaintiff did some work for Mrs. Carey. She says it was without pay, but that Mrs. Carey gave her presents and things like that at different times, and defendant and relator's brother exchanged work. Until a few months before the date of the alleged intercourse, the relator's relations with the Careys seemed to be pleasant. Relator says that she saw that Mrs. Carey didn't want her, and didn't call her up on the phone, when she got ready to wash. Plaintiff testifies that she was a member of the Presbyterian Church, and was active in the work of the Ladies' Guild, and the Church Club known as the Orphans' Home Sewing Society; that the Careys went to the Guild. Defendant testifies, "I hain't got no church." Relator testifies that Mrs. Carey frequently asked her to the Carey home. At one time, Mrs. Carey being under the care of a physician at Atlantic, relator and her brother stayed at the Carey home for some time, she doing the cooking for the Carey family, which consisted of defendant and his two sons, one a young boy, and the other a man grown. Some time before the alleged intercourse, there was some trouble between plaintiff and Mrs. Carey. Relator testifies that Mrs. Carey accused her of coming to defendant's home to see her men, which relator emphatically denied, and offered to call the men before Mrs. Carey to prove that she had always been ladylike. She says the matter was dropped, and that they parted on friendly terms, but that she saw Mrs. Carey did not want her to come there. Mrs. Carey testifies, as to this, that she told relator not to come, and says she did not think relator was a nice woman, because of certain things she claims plaintiff said to her. Mrs. Carey testifies that relator told her that she had had sexual intercourse with different men, and with her brother, and that certain ones had attempted to rape her; says Miss

McKeever told her she was in a tub, bathing, and her brother came in there, and they had intercourse, and witness said, "I never would tell it if I did;" that she didn't say where it was; that there was no bath tub down there; that she said she was in a tub; that she didn't say bath tub. She says she told her husband. She says relator told her she was jealous, and that relator said she said she could take Mrs. Carey's husband from her, and break up her home. These matters are denied by relator. On cross-examination, defendant, when asked what his wife had told him, did not mention the alleged sexual intercourse with others or with her brother. He testifies that his wife told him that the Lunn boy came up there, and talked to her in the house, and that relator got up and went out and got a club and stood him off; that she didn't say he succeeded; and that one Baker, a man 60 years of age, came there and got hold of her and tore her dress nearly off; that, when his wife told him this, he said that, if that was the case, they had better cut them out, "for fear it might affect our reputation." They met occasionally thereafter, and defendant and the brother exchanged work, to some extent, but not so much as formerly. Plaintiff testifies that defendant always treated her right, until the time in question; that she thought of him as a father, and never thought of him as anything else than Mrs. Carey's husband; and that she never did anything to encourage Mr. Carey to offend her. She says that, shortly after they moved there, defendant at first called her "Cyclone Bill," and then shortened it up to just "Bill," because defendant's youngest son took her photograph when the wind was blowing, and defendant said that it was a cute picture, and put him in mind of a cyclone, and thereafter called her "Bill." Relator testifies that, on the morning of October 29th, she got up about 5 or 5:30, and describes what she did; that her

brother left for the day around 8 o'clock; that, after her brother had gone out to hitch up, she saw defendant passing, going south, riding a black stallion; that, after that, she did up her morning work, and was sewing; that, somewhere around 10 or half past 10 that morning,—she could not say exactly, but her best judgment is, about 10:15,—defendant came to the house, and came in the room where she was alone, without knocking; that, after he came in the room, he had a kind of funny grin on his face, and she doesn't remember what he said first; that he came around the sewing machine and reached out and took hold of her; that she asked what he meant; that he put his arms around her and took her across the room to the couch and pushed her down on his lap; and, while she was on his lap, with his right hand removed her underclothes, and held her arms down firmly, with his arm around her; that he then laid her down on the floor, and had sexual intercourse with her. She says she didn't do anything much by way of resistance, only cry and beg; that she was too scared and dumbfounded; that he said, "Bill, don't fight me so;" that afterwards he told her there would not be a bit of danger, "didn't need to be afraid, no one will never know;" that she was still crying and protesting; that, after the intercourse, she rolled over on her face and was crying, and he picked her up and set her down on his lap for five or ten minutes; that she was crying too much to know or care what he did or what happened to her; that she asked him if she had ever done anything down at his house to make him think she was that kind of a girl, and he said, "No;" and when she asked him why he treated her that way, he said her legs were enough to set any man crazy; that she doesn't imagine defendant was in there more than 25 or 30 minutes; that she doesn't know just how long; that she didn't see him come there; that he walked away through the field in a roundabout way through the corn field; that he could

have got off the stubble field, without going through the corn; that he did not take the nearest way home; that he could have gone on the road; that she doesn't know what time it was when he left, but that it was between half-past ten and eleven, somewhere,—she couldn't say. She says her mind wasn't on the clock. She fixed the date because it was the day after McFarland's sale, which was on the 28th. She says that it is pretty hard to erase it from her mind, and is sure that is the date. She testifies that she hadn't kept company with men, gone out riding, and attended functions, for a month prior to the 29th; that she did not keep company with any men during the fall of 1915; that she never had intercourse with any other man. She testifies more in detail than we have stated, and says further that, on February 29th, defendant came to their place, to help her brother Henry; that defendant came to the house, and she told him of her condition, and asked him what she was going to do; that defendant said, "I am sure I don't know,—I know damned well what I done;" that he said he didn't think there was anyone else; that she had seen him before that at a threshers' supper, but in a crowd, and had no opportunity to speak to him; that after that she saw him at another threshing supper, but only passed the time of day; that she told her brother of her condition, May 16th; that the child was born at her house. She says the child is the child of defendant. On cross-examination, she testifies that, at one time, it was raining, and the roof was leaking on new wall paper, and that she and defendant went into the attic with pans, to catch the water; that she told Mrs. Carey of this over the phone, when Mrs. Carey was in Atlantic, and told her the circumstances; that Mrs. Carey accused her, and said that she and Tom were up in the attic; that she had washed that day at defendant's; that the last man that had worked for her brother was in August; that she is not mistaken about the date's being the

29th, because, when a person receives a shock, "they are not likely to forget it;" that defendant never had intercourse with her except that time; that her brother hauled cement blocks that day for Mr. Kirk; that her underclothes were not torn, and that she put them on again, after defendant left.

Henry McKeever, relator's brother, says that, after breakfast, he went out and hitched up his team; that he saw defendant between 8 and half past 8 that morning, riding a black stallion; that defendant was then 10 rods from the house; that it was a clear day. He fixes the date as the day after the McFarland sale, and, at the sale, Kirk asked him to haul blocks the next day. He says the sale was on October 28th, and that defendant came home with him from the sale; that they walked together; that several of the neighbors hauled blocks that day. He describes their relations with the Careys, exchanging work, visiting, etc., and says he traded horses with him on February 29, 1916. He testifies about Carey's going to the house for soap and water that day, when they were doctoring a colt; that, on May 24, 1916, after his sister had told him of her condition, on the 16th, he saw defendant in front of his place; that three other men were present; that witness asked defendant if he hadn't always used him white, and defendant said, "Yes;" that witness then asked him, "What made you use Lila the way you did, last October?" He answered that he never said a word against her in his life; and witness said, "It was not what you said,—it was what you done." Witness testifies that defendant then said, "I never done anything;" that defendant's jaws trembled so he could hardly talk, part of the time; that, prior to the fall of 1915, defendant had always been jovial, and defendant would wave at witness from a distance, but, the next spring, defendant did not look towards him, or notice him when they were close together. Witness Runte

testifies that he lived half a mile south of defendant's place; was at the sale, October 28th, saw the bills, and saw defendant there; the next day, he went to haul blocks at Atlantic; left home about 8 A. M.; saw defendant, the morning of the 29th; went by witness's place, before he left home; defendant was going from his home towards Hannah's, riding a black stallion; was within 15 rods of him; knows defendant well, and knows his horse; is positive he saw him; didn't know where he was going at the time, but learned afterwards; defendant spoke to witness, and says, "Hello, Stormer."

"That is my name. I live a little over a quarter of a mile from McKeever's. Was with Henry McKeever, May 24th, in the road in front of defendant's house. It was at that time that defendant said he hadn't said anything against Miss McKeever. Defendant acted like he was badly scared."

Mr. Hannah says he lived, in October, 1915, half a mile south and 40 or 50 rods east of defendant's; defendant was at his place with a black stallion; bred a mare for witness; it was near 8 o'clock; defendant stayed at his place about a quarter of an hour; doesn't know which way he went when he left. He fixes the time that defendant was at his place on October 29, 1915, because it was the day after McFarland's sale, and, on the 29th, he hauled cement blocks for Kirk. He is positive about the date.

Mr. Kirk testifies as to several of the neighbors' hauling cement blocks for him on October 29, 1915. He fixes the date because he has his bills in his pocket; knows Mr. Hannah; lived half a mile east from where he lived; saw defendant, the morning of October 29th, at Hannah's place. He says it was around 8 o'clock; that defendant had his horse with him; that he is acquainted with the horse, a black stallion. He is positive defendant was there with the stallion;

knows of no other man in that neighborhood who has a black stallion.

Witness Engle testifies to a conversation with defendant with reference to relator, about April, a year before the trial, which would be 1917; that he asked defendant about it, and that defendant at first denied it.

"He said it wasn't his child at all; he said it was her brother's. Q. State what he said. A. Well, I believe he said he did have intercourse with her once."

The witness put it stronger than that, at first; but, the way the answer was framed, it was struck out as a conclusion. His testimony was somewhat weakened on cross-examination, and by answers given by him at a former trial. This is the substance of the State's testimony.

The defendant, testifying as a witness, in addition to what we have before set out, describes the relations between the McKeever's and the Careys. He says he remembers the time Kirk was having cement blocks hauled,—it was October 29th; remembers it on account of the sale, which was on the 28th; was not away from home that morning; did not take the stallion and go away from the place, October 29th; the last mare he bred was Hannah's; had a black stallion; thinks the last he ever bred was October 13th,—Hannah's; kept a stud book; could not find it.

"Looked for it last night, so I could get a date. The date I wanted was the date I was over at Hannah's, the last time. Don't know what became of the book; it was there when we packed up to move. Q. Did your book show any service of your horse on the 29th? A. Yes, sir. Q. Whose? A. I take that back; I thought you said the 13th. Q. No, sir, I am speaking of the 29th. A. No, it does not show any service on the 29th; the 13th was the last time. The horse may have been off the premises after the 13th; I would sometimes ride him to the neighbors'."

He testifies of his doings that morning and forenoon;

did his chores; took a wheelbarrow and went to the field for a young calf. He says that, when he got back with the calf:

"I suppose that would be about 8 o'clock; as to how long it took, I am guessing at it. I don't know how long it took. When I got back with the calf, there was nobody in the yard,—my two sons had gone."

He says he then went to the house and got a drink of water, then went out to peeling poles for a hen roost, about 8 o'clock, about 60 feet from the house. Mrs. Carey and Miss Thompson were about the place, in the house.

"Miss Thompson came down there, when I came with the calf; was peeling poles, when Elliott and Blake came, and that was around 10 o'clock. I could tell you what time it was from noon when they arrived,—a man can tell pretty close. It was a nice, sunshiny day. I guessed at it; I didn't notice the clock; I couldn't tell exactly. We talked business. It was right around 10 o'clock when they came,—I am not positive just to the minute. They stayed for dinner. Had an early dinner, about a quarter of 12. I told my wife to have an early dinner for them. We were at dinner half an hour. The men left after dinner. I came to Atlantic."

Witness denies having intercourse with Miss McKeever on October 29th; denies that he was at her house; says he never had intercourse with her at any time in his life; says the McFarland sale was on October 28th.

"I saw the bills, and was at the sale. I know the cement blocks were hauled for Kirk the next day; there is no question about that. Was at McKeever's in February; had no talk with Miss McKeever, only told her I wanted some warm water, and she said, 'All right,' and went to the reservoir and got it."

Harvey Carey, son of defendant, 29 years old, says:

"The highway past our house runs north and south. We are on the east side of the road. McKeever's lived south.

I hauled blocks the 29th. I think I got to Atlantic about 11 o'clock. Left home around 8 o'clock. I am judging from the time we usually got up and done the chores and got around, also by the time I got to Atlantic. I got up about 5 or 5:30 that morning; had chores to do. Think we had breakfast about 6 or 6:30. Met Blake and Elliott on the road between our place and Atlantic, three or four miles from home. I would not be positive it was 10 o'clock; I don't hardly think it was that late; didn't look at a watch. I couldn't say how long it would take to drive the distance I had. I would say an hour and a quarter, to drive the team from home to where I met them. Think it would be a little after 9 o'clock when I met them. Couldn't say positively when we got to Atlantic,—might have been about 11 o'clock. Nine and three-quarters miles from our place to Atlantic. I don't know that Miss McKeever ever attempted to make love to me."

Blake says:

"Live in Atlantic. Was at Carey's the latter part of October,—can't say the 29th. Went in Elliott's car. Met Harvey Carey on the road. Arrived at Carey's home a little after 10 o'clock; found Carey in the yard peeling poles. Think they had dinner a little early, before 12. Carey did not leave the premises before dinner, after we arrived. Was with him all the time."

Elliott, a brother of Mrs. Carey's, testifies about the same as Blake. He says they arrived at defendant's place about 10 o'clock; "may have been a little before or a little after 10. I didn't look at my watch any time I was there. Don't know what speed we drove."

Miss Thompson says she was staying at Carey's; that she knows Blake and Elliott; that they were there the day the blocks were hauled; that they arrived at Carey's, "I should judge around 10 o'clock, somewhere at that time;" that she was ironing that morning; that she could see the

men talking at the pole pile; that she got up that morning about daylight.

"We usually got up at that time. Don't know when we had breakfast,—perhaps half an hour after we got up,—don't remember the hour exactly,—perhaps longer. Went down and closed the gate when defendant brought the calf up. After the calf trouble, saw Carey after that; couldn't say just as to the time. Came back to the house and went to ironing. When I looked out the window, soon after that, noticed him peeling poles. Couldn't say just what time it was. Didn't miss defendant from the place that morning. The son Harvey left around 8 o'clock. It was early in the morning. I do not fix the time at exactly 8 o'clock,—as near as I can remember, it was around 8."

She doesn't think she remembers all she did that morning. She says she usually made up the beds and helped do the morning work, and such things; that defendant started to peel the poles, after taking care of the calf, couldn't say the time.

"Don't think it was as late as 9 o'clock when he began peeling poles. Don't know whether he went right away to peeling poles after taking care of the calf or not. Didn't see him go there, but the first I noticed, he was peeling poles. Would not say I saw him all the time, but could see him between 8 and 9 o'clock. Saw him several times. Couldn't say he was not off the premises."

Mrs. Carey, wife of defendant, testifies, in addition to what has been before set out, to their relations with the McKeever's; that she remembers Blake and Elliott's coming in October; that she thinks it was the 29th of October. She says she would judge it was about 10 o'clock, and tells about her husband's peeling poles, about the early dinner, and bringing the calf in. She is sure of the date, October 29th, because it was the first day after the sale, and the date the cement blocks were hauled for Kirk. The

highway between her house and McKeever's was open; no part of it out of sight, except, perhaps, a little, the size of the court room. She says she saw men go to McKeever's home in October, 1915, when Mr. McKeever was absent, one of them the Congregational preacher; but, on cross-examination, says some of the same parties came to her house. She says she didn't tell about what Miss McKeever said about her brother on the former trial; says her husband came to the house for a drink probably about half past 9 o'clock.

"I didn't examine the time; was doing my housework that morning." She says there was a grove straight east of the house; that there are no obstructions between McKeever's and her place; that there are trees along the road; that McKeever's is on the west side of the road; that they have some trees in front, but the house is in plain sight; that she does not think Mr. Carey was off the place that morning; that she is positive of it; that she didn't see him every minute.

We have set out the testimony somewhat fully, and have given the circumstances of it, because of the claim that the evidence was not sufficient, and for the further

reason that it seemed necessary on some

2. BASTARDS:
proof of
intercourse.

points in the case. Some of the witnesses appear to have had some feeling in the matter, particularly Mrs. Carey. It is almost

unbelievable that a woman would tell another that she had had sexual intercourse with other men, and with her own brother, unless it should be a very loose woman. There is no particular attack on the character of the complainant, except by Mrs. Carey, and the circumstances of the transaction about which relator complains. It may be that, if Mrs. Carey told her husband the things she says she did, and he was so disposed, he may have thought he could readily have intercourse with relator. It will be noted

that there is but little, if any, dispute as to the day in the month, and that, if the intercourse took place, as complainant claims, it was on October 29, 1915. There is, however, discrepancy in the testimony as to the time of day that certain things testified to occurred. For instance, the defendant testifies that, after he got back from attending to the calf, he went to the house and got a drink, and went out and began peeling poles, at about 8 o'clock; while his wife testifies that he came to the house for a drink at about 9:30 o'clock, a discrepancy of an hour and a half. Some of the witnesses guess at the time. None of them attempts to fix the hour accurately. We have held, in criminal cases for seduction, that the intercourse may be established by the testimony of the prosecuting witness alone, if the jury believe her, even though denied by the defendant. It would be difficult, and next to impossible, to prove sexual offenses in any other way. Though defendant denies the intercourse, it was a question for the jury to determine.

Under the evidence, the jury was justified in finding that intercourse had taken place, as plaintiff claimed, and we think they were justified in finding that it occurred on October 29th. There is no pretense or claim that it occurred on any other date. The more important question, as we view it, is whether the jury was justified in finding that defendant had time to go a quarter of a mile, either on foot or horseback, and be in relator's house 25 minutes. We think the jury was justified in finding that defendant had not covered the time so closely during the forenoon as that he would not have time to do so. A variance of a quarter of an hour or a half hour earlier or later, either way, or both, as to the whereabouts and doings of defendant, during the forenoon, would give him time. The credibility of the witnesses on the disputed point as to the time of day was for the jury. The jury could have found that the defendant did pass claimant's house on the morning

of the 29th, and go to Hannah's. The fact that disinterested witnesses contradict defendant as to this affects his credibility. Hannah testifies that he was at his house but a short time. There was no particular reason for defendant's wife and Miss Thompson to watch defendant all the forenoon. They were engaged about their household duties.

2. The defendant requested an instruction to this effect:

"You are instructed that the defendant is presumed to be innocent until it has been shown by a preponderance of the testimony that he is guilty. Before the defendant can be found guilty, the plaintiff must show by a preponderance of the evidence that he is the father of her child, which is in question in this case."

3. **BASTARDS:**
instructions:
presumption
of innocence.

Error is assigned because of the refusal of this instruction. The latter part of this instruction requested by defendant was covered by the instructions given by the court. The court instructed the jury, in substance, that the burden of proof was upon the State to establish, by a preponderance of the evidence, that defendant is the father of the child; and that, if the fact is so established by the evidence, then the jury should find the defendant guilty; and that, unless it is so shown, the finding should be for the defendant. Appellant cites at this point *State v. Wangler*, 151 Iowa 555, at 562, where an instruction given by the lower court in a bastardy case, telling the jury that defendant was to be presumed innocent until the jurors were convinced, by a preponderance of the evidence, that he was guilty, was approved, in a way. But, in that case, the complaint was as to the instructions, and the court said that, because of the instruction just referred to, the defendant was not prejudiced by the refusal to give other instructions asked. They also cite *State ex rel. Bjorn v.*

Creager, 97 Kan. 334 (155 Pac. 29), where a similar instruction was given. Probably such an instruction would not be prejudicial to defendant. It may be that, in some instances, the force or importance of the presumption is exaggerated by counsel in argument, and perhaps by the jury. In 1 Jones' Blue Book of Evidence, Section 12 A, cases are to be found both ways, some holding that, even in a civil case, such an instruction as that asked is proper. We held, in *State v. Hayward*, 153 Iowa 265, 268, that, even in a criminal case, the failure of the court to instruct that the law presumes every man innocent until he is proven guilty, was not error. In that case, the court instructed that every material element of the crime charged must be proven beyond a reasonable doubt; and this in itself presupposes the innocence of the accused. In addition to this, jurors of ordinary intelligence understand that, in law, every man is presumed to be innocent until proven guilty beyond a reasonable doubt. It is true that, in that case, such an instruction was not asked. In the instant case, there was but one element or question,—the paternity of the child; and the jury were plainly told that, before they could find the defendant guilty, they must be satisfied, by a preponderance of the evidence, of his guilt. The instructions given are equivalent to this requested one, as was the case in the *Hayward* case. There are many instances where there is a presumption of right conduct. The books say that, in the ordinary transactions of life, fairness and honesty will be presumed, and conveyances, sales, and contracts generally are presumed to have been made in good faith, until the contrary appears. A public officer is presumed to do his duty. There are many such cases; and though, in some cases, it may be proper enough to give such an instruction, yet we are not cited to, nor do we find, cases where a failure to so instruct the jury would be error. Perhaps, in some of the cases just referred to, it

would not be error to give an instruction of that kind; but the question is whether it is necessary to do that, and whether its refusal is reversible error. It seems to us that there would be more reason for giving such an instruction in a criminal than in a civil case. 16 Cyc. 1081.

But we have shown that the court has said that, in a criminal case, it is not always necessary. It appears to us that the sum of it is that the jury should be told that the defendant must be proven guilty in a criminal case beyond a reasonable doubt, and in a civil case by a preponderance of the evidence. The presumption obtains all the time, whether a party is on trial or not, in every action, civil or criminal. 1 Jones' Blue Book of Evidence, Section 12 A and Section 13. We see no reason why such an instruction is required in a civil case, unless the presumption has the force of evidence. The presumption in question is not of that character, even in a criminal case. *State v. Linhoff*, 121 Iowa 632. We think there was no error in refusing the instruction in question.

3. The defendant's requested Instruction No. 2 was refused, and error is assigned because thereof. The instruction is a long one, covering two pages of the abstract, and too long to set out in full. It recites

4. **BASTARDS :**
instructions
on re alibi.

a number of circumstances proper for the jury to consider. We think it is not necessary to give the language, but so much only as bears upon the question which appellant now relies on, and argues as an offered instruction on alibi. Some of the matters referred to in it were covered by the instructions given; some of the statements are more or less argumentative. The part now relied upon as being a request for an instruction on alibi is simply one of numerous circumstances enumerated, and is to the effect that it would be proper for the jury to consider where defendant was, and whether he was at plaintiff's house. As to this feature.

we shall give the instruction as asked, or the substance of it. The material part of the instruction in regard to the question now under consideration is practically as follows:

"The jury is instructed that, ordinarily, the exact time when the child in question was begotten, in proceedings of this character, is immaterial, so long as it is within the period of gestation. The testimony of Lila McKeever refers to but one time when it is claimed by her that she had sexual intercourse with this defendant, and that was on the 29th day of October, 1915, at the home of her brother. Lila McKeever claims in her testimony that at no other time or place did she ever have sexual intercourse with the defendant. The defendant denies that he had sexual intercourse with the plaintiff at that time, or any other time. In determining whether the defendant is the father of Lila McKeever's child, * * * you should consider no other time or place save and except in the home of her brother, on the 29th day of October, 1915; as there is no evidence on either side that the said Lila McKeever ever had sexual intercourse with him, unless it occurred on the 29th day of October, 1915, at the home of the brother of the said Lila McKeever. You should consider, in determining what the truth is about the matter of associations, his treatment of her before and after October 29th, as throwing light on whether defendant had sexual intercourse with her at that time and place, and where the defendant was on that day, whether at relator's home or elsewhere; and in this connection you should consider the interest, if any, of the witnesses * * * and from all the testimony determine whether or not defendant did have sexual intercourse with plaintiff on that date," etc.

So that the reference in this instruction to his whereabouts is one of numerous circumstances referred to in the instruction. The court is not required to instruct on every phase of the testimony. We think the request for this

instruction does not amount to a request for an instruction on alibi. Counsel concede that it is not in proper form to present that question, but say that the principle was referred to, and that the court, therefore, should have given one on that subject. But several other matters were therein called to the attention of the court, just as much as the question of his whereabouts, and we think it would have been well enough for the court to have referred to some of these; but we are discussing now the question of alibi, and whether defendant did really request an instruction on alibi. Had ordinary instructions been given by the court as to alibi, defendant would be in a position to complain, and say he had not asked an instruction on alibi. The instruction offered does not mention alibi, does not state that the burden of proof is on the defendant (*State v. Fry*, 67 Iowa 473, 478), and does not advise the jury to scan the testimony introduced by defendant to establish the alibi with care and caution, as it is recognized under the law as a defense easily manufactured (*State v. Rowland*, 72 Iowa 327). It is our experience that attorneys defending generally prefer that the court should not give such an instruction, and complain if it is given. Of course, alibi is a legitimate defense, but it is known of all men that, as to the time of day, witnesses are easily mistaken. But, after all, appellant's argument is directed, not so much to the time of day, as it is to the date or day in the month. The argument is that, complainant having fixed October 29th as the date, to permit the jury to return a verdict of guilty on any other occasion, and on any other time except October 29th, would be to permit the jury to return a verdict that had no support in the evidence, and would permit the jury to find defendant guilty of acts of sexual intercourse with complainant at times when there is no evidence that defendant had intercourse with her. Appellant cites *State v. Ryan*, 78 Minn. 218 (80 N. W. 962). In that case, the complain-

ant positively fixed August 25th as the date of the intercourse, and the court instructed that, unless there is proof of acts of sexual intercourse on the 25th of August, or about that date, etc. The court held that, under the peculiar circumstances of that case, this was error, although recognizing the fact, as the offered instruction in this case does, that the precise date is not always material, provided it is within the period of gestation. In that case, the evidence showed that, on the date fixed, and for two days, she had been menstruating, and that this condition continued for about two days afterwards. The evidence showed that a woman is not likely to become pregnant under such conditions, and the evidence further showed that the parties were together on other occasions, not far from August 25th. We think the cases are readily distinguished. In the instant case, the court did not instruct as to October 29th or "about that date;" the complainant and defendant were not together on other occasions near October 29th; and other conditions existed there which are not found in the instant case.

State v. Creager, supra, is also cited, as sustaining a similar proposition. The offered instruction recites that there is no evidence on either side that Miss McKeever ever had sexual intercourse with defendant, unless it occurred on the 29th day of October, at the home of her brother. The jury knew this just as well from the evidence as if they had been again told by the instruction. We must assume that the jury has common sense, and we ought not to assume that the jury will disregard the testimony, and find that the intercourse took place at some other date, when there is absolutely no evidence that it did occur at any other time. The jury must have understood that, before they could find the defendant guilty, they must find he had intercourse with complainant at the time and on the

occasion testified to by her. Furthermore, the court instructed the jury:

"5. The complainant claims that, on the 29th day of October, 1915, the defendant came to her home in Bear Grove Township, and there had sexual intercourse with her, and that she became pregnant as a result of such intercourse, and was delivered of a child on July 26, 1916, and she claims that defendant is the father of the said child. All of the above matters are denied by the defendant. The burden of proof is upon the State to establish, by the greater weight of the evidence before you, that the defendant is the father of the said child; and, if this fact is so established by the evidence, then you should find the defendant guilty; but, unless it is shown that he is the father of said child, by the greater weight of the evidence before you, then you should find defendant not guilty."

The court further instructed the jury that they should consider "each and every other fact and circumstance in evidence before you tending to throw light" on the question; "and, taking all such matters into consideration, you should weigh the testimony of each witness, in the light of reason and common experience," etc. We have discussed to some extent the evidence on this point in a prior division of the opinion. We think there was no error in refusing to give the instruction in question. Evidence as to so-called alibi in a civil case is evidentiary, and does not apply as in a criminal case.

4. It is thought that the court erred in giving Instruction No. 3. The objection is that it assumes facts essential to be established by proof, which were not admitted by defendant in his answer. In that

5. TRIAL:
assumption
of fact.

instruction, the court said, in substance, that it was conceded or established by the evidence that complainant was an unmarried person, a resident of Cass County, and that, on the

date stated by complainant, the child was born. It is true that the defendant did not admit these things in his answer, but the evidence was undisputed, so that the court was warranted in so stating.

5. Finally, it is contended by appellant that the judgment is excessive. The amount fixed by the court was \$2,250. The judgment provided that defendant pay into court, for the use of relator in the maintenance and support of the child, said sum, with interest thereon from the date of the judgment. No cases are cited by appellant, and there is no definite rule as to the amount. Appellee cites *State v. Ginger*, 80 Iowa 574, where \$700 was allowed. But that was nearly 30 years ago. They cite, also, *Ludden v. Butters*, 181 Iowa 94, as having some bearing. If any evidence was taken by the court as to the amount, it is not before us. It does not appear from the record that the amount allowed is more than sufficient to maintain the child. Probably we may take notice of conditions, in a general way, without proof. The amount does seem large; and yet living conditions are very high at this time. The amount fixed would amount to about \$2.00 a week, until the plaintiff's son will probably be self-supporting. That would be low, under present conditions. But doubtless there would be some interest. Under all the circumstances, we are not prepared to say that the judgment is too large. We discover no prejudicial error in the case, and the judgment is—*Affirmed*.

6. NEW TRIAL:
excessive
verdict.

WEAVER, C. J., LADD, EVANS, and GAYNOR, JJ., concur.

SALINGER, J. (dissenting). I. Defendant did not ask for a directed verdict, and seems to concede there was enough evidence to warrant submission to a jury. But he urges that the jury exercised its proper function improperly, by returning a verdict which is contrary to and

not sufficiently sustained by the evidence, and, therefore, is the result of passion and prejudice. There is reason to believe the majority is holding that such a complaint cannot be entertained, unless the insufficiency of the evidence amounts to such absence of evidence as warrants a directed verdict. This is a misconception. It is settled that, though the right to claim a directed verdict does not exist, or has been lost, yet the right remains to insist, on motion for new trial, that the evidence does not sustain the verdict. *Heiman v. Felder*, 178 Iowa 740, 748; *Hanson v. Hough*, 177 Iowa 93, at 101. Indeed, if the rule were otherwise, some statutes would have no room to operate. The legislature, well knowing that no motion for new trial was needed to test the propriety of overruling a motion to direct verdict, yet enacted statutes demanding motion for new trial, in order to challenge the sufficiency of the evidence to sustain the verdict returned, and it provided an appeal, where such a motion was overruled. This must mean that, though there was enough evidence to warrant a submission, there might be appellate review on whether, though there was not literally an absence of evidence, it was, nevertheless, so weak and contradictory as to indicate that the verdict rests on an unsound basis—on an improper weighing of evidence. The defendant may, in anticipation that the evidence will be fairly dealt with, say, in effect, that there is enough evidence to send the case to the jury, and yet complain when the event shows it was not so dealt with. If it transpire that the verdict rests on nothing but evasive, unreasonable, and unnatural testimony of the party having the burden, the appellate court should interfere though it may not be said there is a literal absence of evidence. Such unnatural testimony is not aided because the defendant denies, and his denial does not make the “conflict” which prevents our interference. And this case should be ruled by decisions such as *Chicago Cottage Organ*

Co. v. Caldwell, 94 Iowa 584; *Eastman v. Miller*, 113 Iowa 404; and *Williams v. Budgett*, 186 Iowa 196. In the last-named case, there was no motion for a directed verdict. The sole complaint was that the verdict should not stand, because it rested on the testimony of the plaintiff in what was a suit for debauchment, and that her testimony was unnatural and self-contradicting. The appellee argued against the claim that the plaintiff had told "a disconnected and self-contradictory story," by saying that her testimony "was sufficiently well connected and uncontradicted as to convince twelve fair-minded and unprejudiced men that she was telling the truth in the matter, which shows conclusively that the verdict was supported by sufficient evidence to warrant the finding." We said that this amounted to an assertion "that, when a complaint is made on appeal that the evidence is of such a nature as that the verdict is unwarranted, a sufficient answer to such an attack upon the verdict is made by the fact that the verdict was rendered; that this position quite eliminates all appellate consideration of the assignment that a verdict lacks sufficient support;" that, under it, "the existence of the verdict would preclude inquiry into whether it should exist, and that appellee, in effect, urges that appellate review of a verdict must be the declaration that whatever is right:" and we concluded by saying that we thought, on the authority of *Miller v. Paulson*, 185 Iowa 218, that review should go beyond that.

As it seems to me, then, the thing to be decided here is not whether the relator had no evidence, but whether her testimony is so unnatural, contradictory, and unreasonable as that the jury acted from passion and prejudice in finding for her.

II. Relator and her brother stayed at the home of defendant for parts of four weeks. At this time, Mrs. Carey was not at home, except over Sunday. Relator stayed

nights, and, while she says she does not know, she concedes that she and defendant may have been on the place alone. To a certainty, the two were once alone in an attic. If she be believed, during all these times, defendant acted like a father, and there was not as much as an improper suggestion. If she be believed, defendant, not an impulsive youth, but a man who had accumulated substantial property, and was 60 years old, made no use whatever of all these opportunities, and, instead, selected broad daylight, and a time when his absence from home would be noticed, to go, without prearrangement, to the house of relator. Her house was in plain view from his home. It stood on the higher ground, and men who entered it could be identified by persons in the home of defendant. According to her story, defendant entered a room the door of which was open, and into which room anyone could look. She says that, at all times theretofore, he had never acted abnormally, treated her with every respect, had been more like a father to her than anything else; that she had thought of him more as a father than anything else; had never thought him anything else than Mrs. Carey's husband; and that she had never done anything to encourage him to offend her. After having wasted better opportunities, and refrained from much more natural approach, it is remarkable how, under these conditions, defendant had the temerity to select such a time and place as he did, and to assume what the event proved to be a correct assumption: to wit, that she would submit without word or struggle. It would seem that no one but a maniac would have taken the risks he did, if relator correctly states the antecedent history of the relations. It is even more unnatural and remarkable that, with such past relations, a woman 36 years old, and asserting virginity and devout adherence to church, should have failed to utter even a single word of astonishment or protest, while defendant, without a word, entered upon and

accomplished his purpose with the utmost promptness. I am not overlooking that neither chastity nor resistance are essential here. I am merely pointing out that such an unreasonable and unnatural story works an impeachment of any who utters it. It is not overlooked relator testifies that defendant said, "Bill, don't fight me so." Unfortunately, she testifies fully to everything that occurred, and nothing is indicated from which defendant could infer that he was being fought, or that should induce him to ask that the fighting cease. This, like her evasiveness, goes to credibility. But, after all, it is the credibility of the interested complainant, who speaks without corroboration. As to her, credibility is somewhat less for a jury than is that of an ordinary witness. And there is involved the rule that, while one is not defeated because his witnesses differ, he is defeated if admissions made by him as a witness contradict what he says in his own favor.

2-a

And relator is evasive, and strongly indicates animus. She says that, while she was not actually ordered off the place, the pleasant social relations theretofore existing with the Careys came to an end, a few months before the alleged conduct of defendant; that she realized Mrs. Carey didn't want her; that the custom of calling her later to help wash ended; that exchange of work between defendant and the brother of relator ended. She says Mrs. Carey never told her why this all occurred. It is, however, undisputed that Mrs. Carey did tell her not to come back any more, and it was drawn from relator that she well understood what the trouble between her and Mrs. Carey was. One trouble was an accusation by Mrs. Carey that relator was coming to the place to see "their men," not including her husband. Relator finally says that it was about from this time on that the friendly relations began to wane. Later, she added that, after she had told Mrs.

Carey that this accusation was a lie, the latter was just as good to her as she had been before; and she persists that she does not know why she was not called to help wash afterwards, and in saying that "why she did this, I never knew her reason for it." Perhaps she might have guessed at the reason, in the light of her further testimony that there was difficulty between her and Mrs. Carey, because the latter accused her and the defendant of having gone up into the attic.

2-b

There are other things that add to the unreasonableness of it all. She was a virgin, 36 years old, and defendant a man of 60. There was but the single act; yet pregnancy resulted. Defendant made no request that relator keep silent. But she said nothing, when her brother came home. The act occurred on October 29th. She discovered her condition about two weeks later. She made no complaint until about four months later. She then advised defendant, and coupled it with an inquiry, "Mr. Carey, do you think there is anyone else?" She did not inform her brother for two months after she had spoken to defendant.

2-c

Relator was not obliged to claim that no other man could be the father of her child, and it may be conceded that it is almost impossible to prove such an alibi. But, since she chose to testify that she was exposed to no other man, it is permissible to consider that she says she rode in an automobile with a man "in the fall of 1915." Also that, when she advised defendant of her condition, she said, "Mr. Carey, do you think there is anyone else?" All this leaves matters as they were. There is no corroboration by a showing that it was impossible for another to be guilty. The attempt thus to corroborate relator consists of her uncorroborated and disproven exclusion of others. It still

remains true that nothing but the word of relator singles out the defendant.

2-d

Williams v. Budgett, 186 Iowa 196, affords full support for setting this verdict aside. So does *State v. Wangler*, 151 Iowa 555, 563. It is true it holds that the evidence in it was not so absurd, self-contradictory, and did not relate matters so physically impossible, as to enable the court to set the verdict aside for those reasons. But an examination of what is stressed in that case, including the corroboration of the complainant, makes plain that the sufficiency of the evidence can be reviewed on appeal, and that the verdict would have been set aside, had there been such a state of the evidence as is disclosed in this record.

There are but two methods by which an affirmance can be effected. The judge may force himself to believe, as a judge, what his reasoning as a man scouts. I regret to say that two members of the court seem to have done that in the *Wangler* case. If it is a fair question whether the evidence is incredible, the appellate judge should yield to the jury. And that is so even if his finding, were he a juror, would not be what the jury found. But I know of no obligation to sustain a verdict when I am abidingly satisfied (as I am here) that it has no support that I am able to credit. If, in order to uphold a verdict, the court must sustain a finding that white is black, there is no occasion to retain the statutes which permit review of a verdict. The remaining method of sustaining this verdict is to indulge in the inherent self-contradiction of believing appellee because one does not believe her. In other words, the only way of enabling one to believe that relator ought to have a verdict is by believing that, if she had told the truth, instead of not telling it, her story would have been a more reasonable one. If she had said there had been frequent solicitation and indulgence, the story told as to

what happened on the day in question might become credible. Many changes that could be suggested would have the same effect. But it is a remarkable twist in judicial reasoning that one may keep a verdict because he has not spoken the truth. In *State v. Ryan*, 78 Minn. 218 (80 N. W. 962), a bastardy prosecution, the court, in setting aside the verdict, said:

"If her statement as to the occurrence was disbelieved and rejected by the jury, there was an entire absence of evidence to support the verdict."

That is what should be said here. If a more credible story could truthfully have been told, and the incredible one is not truthful, there is no room for supporting the verdict on what it is imagined the truth would be. The only permissible result of finding that the complainant testified falsely is to eliminate her testimony; and it is uncorroborated. Its incredibility should not be made the means of supporting her recovery, by imagining a credible story for her. The belief that she has testified to what is untrue, because improbable and unreasonable, should have no effect, except to expunge her testimony.

III. Defendant attempted to show that he was at home at the time when relator charges him with having been at her house. His witnesses on that point include Miss Thompson and Blake, then the postmaster of Atlantic, both unimpeached, and absolutely disinterested. Indeed, the majority does not raise the issue of credibility in this connection. It avoids this line of testimony with the statement that if, through honest mistake, the witnesses on both sides erred by as little as a quarter or a half hour, earlier or later, the testimony on the so-called alibi would be ineffective. It is one weakness of this class of testimony that honest witnesses may put the right picture into a wrong frame; that they may truthfully testify as to the doings and whereabouts of a defendant, but, through mis-

take, be speaking of a date other than the one in inquiry. That weakness is eliminated here. The alleged act occurred on the day which succeeded the McFarland sale, and on which Kirk employed the brother of relator, and also the son of defendant, to haul tile to Atlantic. The day was the only day on which Blake and Elliott were ever on defendant's farm together. So there is no question that whatever is spoken to did occur on the day designated by relator in her complaint. Nor is it possible to dispose of this issue by the statement that an honest misjudgment of time, by so much as a quarter or half of an hour, destroys this defense. It cannot be disregarded, without a holding that the wife of defendant and Miss Thompson, the latter wholly disinterested, committed perjury. These witnesses unite in saying that, during the whole forenoon, defendant was peeling poles, in unobstructed view of the house, where he was in plain sight from the house in which these witnesses were. True, they did not say that they had their eyes on him all of the time. But they do say that they did not miss him on that forenoon. The majority concludes that this testimony is of no value, because "there was no particular reason for defendant's wife and Miss Thompson to watch defendant all forenoon. They were engaged about their household duties." All that is true. But it does not change testimony that this man was at work in plain sight; that he was observed, from time to time; that Miss Thompson saw him, as he went back and forth; and that he was not missed, all of that forenoon. Mistake will not suffice here. This testimony is either true or willfully false. It is not a question of a quarter or half an hour. True, the majority speeds the incident up by assuming that defendant may have traveled on horseback. The testimony of relator is that he came on foot, and went away towards his home by a roundabout route. It is utterly impossible that he can have left his home on foot, remained in the house of relator

25- or 30 minutes, that she says were used up, and have returned home without having been away from home at least a full hour. So the majority finally concludes that these two women, who saw defendant at work, peeling poles, were so engrossed in their housework that they are honestly mistaken, when they testify that they did not miss him during all the forenoon; that he could not have been away for an hour or more without their knowledge. I cannot avoid believing that, unless both these women are perjured, defendant was not away long enough to do that with which he is charged.

3-a

On the question of what time in the day it was when Blake and Elliott came upon defendant's farm, there is more room for the attitude of the majority than there is as to the testimony that defendant was not missed at all during that forenoon. On this point, I would agree with the majority, if the relator, on one hand, and the witnesses for the defense, on the other, merely undertook, at the time of the trial, to say, without more, that certain things occurred at a particular hour of the day. But none of them confine themselves to such an arbitrary statement. They all narrate circumstances that, of themselves, tend to show time. And, allowing for all reasonable variances, I still think it plain that, if the relator is to be believed, Blake and Elliott saw defendant at his home at just about the time when relator declares he first entered her home. I will not enlarge beyond this statement at this time, because the details must be gone into in another connection.

IV. Now, as to the instructions: The relator begins with the statement that her brother left home that morning around 8 o'clock. She had her housework done, and sat down to her sewing machine about half past 9. It is her opinion that, when defendant came in, she had been at the machine about half or three quarters of an hour.

Upon these antecedent things, she gives it as her best judgment that defendant came in at a quarter past 10. She says he remained from 25 to 30 minutes, and it may fairly be said he had occasion to be present at least that long. He walked away through a field, not in the direct route to his home. Relator says that this was about a quarter to 11. To be sure, she has such qualifying words as that she imagines that, when he arrived, it was somewhere between 10 and half past 10; that she can't say exactly, but thinks he left at about a quarter to 11,—at any rate, between half past 10 and 11 somewhere. On the other side, we have the time at which defendant's son started to Atlantic to haul tile, the speed at which he drove, and the distance out at which he met Blake and Elliott. We have the means of locomotion used by Blake and Elliott, and the distance between the meeting place in the road and the home of defendant. Blake and Elliott and Miss Thompson and defendant and his wife all unite in saying that Blake and Elliott arrived around 10, a very few minutes thereafter; that positively it was not as late as 10:30; and, when they arrived, they found defendant peeling poles. We have testimony that they remained some 2 hours; that an early dinner was ordered for them; and that they left a few minutes after 12. The direct testimony, based on the circumstantial evidence, makes it fairly plain that, though relator does not fix time exactly, defendant could not, on her evidence, have left in time to be home before 11 o'clock. And it is as plain that by no possibility did Blake and Elliott arrive later than 10:30.

A refused offered instruction asked the court to charge, among other things, that, upon whether the act occurred at the time charged, the jury should, so far as it was shown by the evidence, take into consideration "where the defendant was on that day; whether he was in the home of the brother of relator, on the morning of October 29, 1915, or whether

he was elsewhere." There was the aforesaid evidence bearing on that question. Grant that this testimony may rest on an honest mistake, and that, therefore, it is not so strong as to warrant interference with the verdict. Grant that the jury might rightly have found the witnesses were mistaken, and that an alibi had not been established. But who will contend that the evidence I have set out was such as to compel the jury to disregard it? And yet the refusal of the instruction was, in effect, a ruling that the jury had no right to find, on this evidence, that plaintiff was not at the house of relator at the time she claims he was. How does the majority defend this refusal? The opinion concedes it would have been well enough to have made reference in the charge to some of the circumstances covered by the offered instruction, and adds that the request as to how the whereabouts of the defendant should be dealt with was but one of several circumstances referred to in the offered instruction, and the court was not required to instruct on every phase of the testimony. In the absence of an offer, failure to instruct may ordinarily not be complained of. It does not matter what is not charged upon, so long as the instruction given does not err in what is said. But the very office of an offered instruction is to improve upon an abstractly correct instruction given, by making it more full and more pointed. Therefore, the abstract fact that the court is not bound to refer to all that the evidence discloses is no answer to a failure to present a theory distinctly disclosed by the evidence upon which an instruction is asked.

The next avoidance argument is that the instruction did not use the word "alibi;" that the offer included no statement that defendant had the burden, and did not have the usual cautionary instruction, given where alibi is submitted; and that it is the experience of the majority that attorneys, as a rule, prefer that an alibi instruction, carry-

ing, as it does, the usual disparagement, should not be given. The attorneys in this case evidently did not prefer that such an instruction should not be given; for they asked it. It follows they could not have complained if it had been given. True, the offer did not say anything as to burden of proof, nor in disparagement of the defense of alibi. But, if it be assumed, for present purposes, that the issue of alibi, in strictness, was tendered, still the request that said testimony be considered was a proper one, and it was open to the court to safeguard the giving of it by adding the rule as to the burden of proof, and the usual disparagement of the defense. It was, at worst, a case for giving, with proper modification.

The final avoidance is that the field of the offer was sufficiently covered because the court did instruct the jury to consider each and every fact and circumstance in evidence which tended to throw light on the ultimate question, and that, after taking all such matters into consideration, it should weigh the testimony of each of the witnesses, in the light of reason and common experience. If that suffice when a definite instruction is asked, all law on appellate review of instructions is put into utter confusion. Following it to its logical end, the holding of the majority comes to this: Appellant may not complain of an instruction given, merely because it is not full enough or not specific and clear enough, unless he has attempted to get a more complete and clearer instruction by means of an offer. But if he does make such offer, he can have no review, because the instruction given is correct as far as it goes. If he makes no offer, he may not complain that the charge, though abstractly correct, is not sufficiently specific. If he does make the offer, he cannot complain of its refusal, because the instruction, in a general way, and in a general way only, covers what he has asked to be made more specific. Paucity and generality may not be complained of, in the

absence of an offer. If the appellant does not ask that the broad charge be made definite, certain, and easily applied, he can have no relief on appeal. But if he does offer an instruction because there is that objectionable generality, he will be denied relief, because such general instruction *was* given. I am unable to find any theory upon which the trial court was justified in refusing to let the jury pass upon the weight of the aforesaid testimony.

V. A related question arises on the same refusal to instruct. The offered instruction did not ask a submission of alibi, in its usual sense. It was not the theory of defendant that his evidence, if believed, demonstrated that he never was where he might have had intercourse with relator. This is perhaps another reason why it is not material that the offer omitted burden of proof and disparagement. The theory which he desired submitted was that, no matter what else it found, the jury could not convict, unless it found paternity was created by commerce had on October 29, 1915. He asked consideration of said testimony, not on whether he was the father, but on whether the child was begotten on that very day. In effect, he presented that, if the jury refused to believe the testimony of relator that the act occurred on that day, no evidence of guilt was left, and he desired that said testimony should be considered, in determining whether the act did or did not take place on October 29th. According to *State v. Ryan*, 78 Minn. 218 (80 N. W. 962), this is a sound theory. In setting aside a conviction in a bastardy case, the court said:

"If her statement as to the occurrence was disbelieved and rejected by the jury, there was an entire absence of evidence to support the verdict."

If defendant was entitled to such a limitation on the field of inquiry, the instructions given do not have a hint of it. They advise the jury that the complaint charges the

act occurred on October 29, 1915, and further charges that a child was born after the period of gestation. Then follows a statement that the defendant denies connection on that date, or any other. The jury is next told that the only question for its determination from the evidence is "whether the defendant is the father of the child." The court continues that the State has the burden to establish that the defendant is the father of the child, and, if that fact is shown by a preponderance, he must be found guilty. The range of the inquiry is once more limited by the eighth instruction, which tells the jury that the only thing it is called upon to determine "is whether or not the defendant is the father of this child;" and, that being found from the evidence, there is an end, because all orders as to proper support are for the court. The child was born on July 26, 1916. Of course, the jury could, in reason, find that it may have been begotten two or three days before October 29, 1915, or two or three days after that date. The court not only failed to instruct that a conviction could rest upon nothing except a begetting on October 29th, but charged expressly that paternity was the only question, and thereby, by the clearest implication, that the fatherhood was all, and the time of begetting nonessential. The complaint and the evidence in support of it made October 29th vital. Yet the court, in the face of a request to limit the inquiry to that date, sanctioned it to be made without reference to that date. In *State v. Ryan*, 78 Minn. 218 (80 N. W. 962), the defendant offered a similar instruction. It was not refused. All that was done was to modify it, by qualifying the date fixed in the offer with the words "on or about." There, as here, the complaint and the evidence settled upon the one day fixed in the offered instruction. The verdict was set aside. The court, in so doing, expressly recognized that, ordinarily, it suffices that connection within the period of gestation be shown. But it differentiates cases like the

one before us, because to permit such range in them would be to permit a verdict unsupported by either plea or proof.

The justification by the majority is, in effect, that no date except October 29th is as much as referred to in either the complaint or in the evidence; that there was no pretense or claim that the connection took place on any other date; and that, since one must attribute the possession of some common sense to jurors, the jury knew, without any instruction, that it could not find the defendant guilty unless it found the act occurred on said date. Of course, if the fact that jurors are credited with common sense sustains the argument founded upon that assumption, there is really little need to have a jury instructed at all. It is never impossible that jurors will arrive at the right conclusion to be drawn from the plea and proof. But yet it is customary to instruct them, nevertheless, and, indeed, the statute seems to contemplate that there must be instructions. If there had been literally no instruction on the subject, the verdict would be in better case. But there was not only a failure to tell the jury that it must limit its consideration to one day, but there were statements from which any reasonable mind could infer that, if it found defendant was the father, that was sufficient, even though he failed to believe that the connection was had on October 29th. Therefore, I find it difficult to agree with the statement of the majority that "the jury must have understood that, before they could find guilt, they must find he had intercourse with complainant at the time and on the occasion testified to by her." This very argument or assertion is fully discussed in the *Ryan* case, *supra*. There, as said, the trial court did give the instruction offered, but modified it by prefixing to the time stated in the offered instruction the words "on or about." It thus left the jury at liberty to find whether the act occurred on or about the time fixed, and the court said:

"It is true that the inquiry in this class of cases is as to the paternity of the child, and not as to the exact day on which it was generated; but it is essential to allege a date in the complaint, and to substantiate the allegation at the trial. The exact day on which the child was begotten is immaterial, except as it bears upon the principal question, which is, whether or not the accused is the father of the bastard. And the court below could have safely charged the jury in this action that, while the exact date of the intercourse between these parties was not material, the occasion was, because of the peculiar circumstances testified to by the complainant. But this is not what the court charged, nor was the charge equivalent to this. It gave the jury an opportunity wholly to reject the testimony of the plaintiff as to what transpired on the evening of August 25th, and at the same time to conclude that the child was begotten on some other occasion, about that day. * * * Under the charge as given, including the modification of the requests of counsel, the jury might have been misled on the subject of dates, and have felt justified in disbelieving the complainant's account of the time, place, and circumstances under which she became pregnant."

The court continues that, since there was great inherent improbability if the act occurred as the complainant stated, that very improbability, instead of resulting in discrediting her testimony entirely, and leaving the State without any evidence, may well have resulted, under the breadth of the instructions, in a conclusion that, since the act was improbable under the circumstances narrated and the time fixed, and since the birth occurred within the period of gestation, starting with a day or two before or a day or two after the time narrated, that, while it did not occur at the time and place testified to, that yet defendant was guilty. The court concludes with the statement that "the peculiar circumstances of the case were such that the charge

should not have been subject to misconstruction," and therefore reverses.

Nothing I am able to add would strengthen the foregoing pronouncement. Both on reason and authority, the rule adopted by the district court was too broad, and was, under the conditions of the record, misleading. It seems to me to be manifest, therefore, that, even if it could be said the charge given was not affirmatively erroneous, it was clear error to refuse the limitations upon it which the defendant offered.

AMY WATTERS et al., Appellees, v. ELMER PROSSER et al.,
Appellants.

WILLS: Contract in Consideration of Dismissal of Contest—Construction. An agreement between a mother, beneficiary under a will, and a contestant of the will, that, in consideration of the dismissal of the contest, the mother's estate shall, at her death, be equally distributed to contestant and others, refers to the property received by the mother under the will, or the changed form thereof, and will be enforced accordingly.

Appeal from Linn District Court.—MILO P. SMITH, Judge.

MAY 11, 1920.

SUIT to set aside deed, and decree plaintiffs and defendant Elmer E. Prosser owners, as tenants in common, of a certain tract of land. Decree was entered as prayed. Defendants appeal.—*Affirmed.*

F. L. Anderson, and *Grimm, Wheeler, Elliott & Jay*,
for appellants.

Voris & Haas, for appellees.

LADD, J.—Carlos B. Prosser died testate, July 2, 1906, survived by a widow and three children, and leaving what purported to be his last will, devising all his property to

his widow, Eveline Prosser. When the alleged will was tendered for probate, one of the children, Amy Watters, interposed objections thereto, on the grounds that decedent was incompetent to make a will, and that that tendered was the product of undue influence. On November 22, 1906, proponent and contestant entered into an agreement, in words following, omitting formal parts:

"That the said Amy M. Watters has filed objections to the probating of the last will and testament of Carlos B. Prosser, deceased. Now, in consideration of the covenants hereinafter made and entered into by and between the parties hereto, the said Amy M. Watters hereby agrees to withdraw her objections filed herein, and permit said will of Carlos B. Prosser, deceased, to be proved and probated without objection. And Mrs. Eveline Prosser, mother of said Amy M. Watters, Elmer E. Prosser and Julia A. Ahrens, in consideration of the said Amy M. Watters withdrawing said objections to the probate of said will, hereby agrees and covenants not to make a will disposing of her property, and agrees that her estate at her death, be equally divided between her said three children, to wit: Amy M. Watters, Elmer E. Prosser and Julia A. Ahrens. And the said Mrs. Eveline Prosser covenants and agrees for and in consideration of the withdrawing of the contest in the above entitled matter that she will not sell or dispose of the following described real estate, to wit: The south half of the northwest quarter of Section nineteen, Township eighty-four, north, Range one, east of the fifth P. M., Jackson County, Iowa, being the real estate which she inherits under her husband's said will, to either of her said three children, or incumber the same for their use or benefit, or either of them. It is further stipulated and agreed between the proponent and contestant to said will that the proponent shall pay all the costs incurred by her in the procurement and attendance of the witnesses here in her

behalf, and that the contestant agrees to and is to pay all other costs in said proceeding."

In pursuance of this stipulation, all objections to admitting the will to probate were withdrawn, and it was admitted, and the widow took all the property. Subsequently, the widow sold the property so obtained, and out of the proceeds paid Amy Watters \$1,000, and her brother, Elmer Prosser, a like amount, and purchased the south half of Lot 8, a subdivision of Lot 8 of the irregular survey of the northwest quarter of Section 1, in Township 83 north, Range 7 west of the 5th P. M., and, on October 23, 1918, conveyed the same to defendant Elmer Prosser. Grantor therein departed this life, November 9th following. The plaintiffs allege that the last-mentioned deed was without consideration, in violation of the agreement, and pray that it be set aside, and the record thereof canceled, and that title be confirmed in the three heirs of the grantor, as tenants in common.

Were the widow disposed to deal with her children equally, that is, leave each one third of her estate, nothing would be accomplished by the contest. Manifestly, the purpose of the contract was to so bind her that such a distribution might not be obviated. The contestant performed her part of the stipulation by withdrawing the contest. The widow did not violate her promise not to make a will disposing of her property, nor did she violate the undertaking not to sell the land acquired under the will to either of her children. She did not undertake not to sell to a stranger. The controversy centers on the construction to be given the clause wherein she "agrees that her estate, at the time of her death, be equally divided between her three children, to wit: Amy M. Watters, Elmer E. Prosser and Julia A. Ahrens." The contention of appellant is that the word "estate," as here found, has reference to that of which the widow would otherwise be seized immediately prior

to her death; while appellees urge that the parties had in mind the property so held by her generally, and regardless of time, save as fixing the date of its distribution. The clause quoted provides for the final and equal division of her estate. What estate? Not such as passes to the heirs on the death of an ancestor, for this was to be divided by contract. It is the estate which the widow acquired under the will, by virtue of the contract, and which, though the property changed in form, continued the same estate which she acquired as devisee under testator's will, and solemnly undertook in her contract should, at her death, be divided among her children. This construction is in accord with other portions of the instrument, and, in defining how and when her property should be divided, impliedly precluded its disposition in any other manner. This construction harmonizes with the spirit and purpose of the parties, and, in our opinion, does not do violence to the language employed. It effectuates the manifest design of the parties in exacting an equal division of estate of the testator, passing through his widow among the progeny of both.—*Affirmed.*

WEAVER, C. J., GAYNOR and STEVENS, JJ., concur.

IDA V. BOHEN, Appellee, v. NORTH AMERICAN LIFE INSURANCE COMPANY OF CHICAGO, Appellant.

INSURANCE: Fraud as to Physical Insurability—Jury Question.

- 1 On the issue whether the insured fraudulently, knowingly, deceived the insurer as to insured's physical insurability, a jury question is presented by evidence tending to show: (1) That insured stated positively in the application that she had never had the ailment in question; (2) that she might have such an ailment and not know it; (3) that she stated to a physician, after the policy was issued, that she had been told that she did have such ailment; and (4) that she was, in fact, so afflicted. (Sec. 1812, Code, 1897.)

INSURANCE: Evidence as to Fraud in re Insurability. Evidence
2 that one beneficiary surrendered his policy, on return of premium, is not admissible in an action on another policy, on the issue of fraud as to insurability, even though both policies were issued on the same application.

DEPOSITIONS: Oral Taking Outside State Not Permissible. Dep-
3 ositions may not, in the absence of an agreement, be orally taken outside the state.

APPEAL AND ERROR: Acquiescing in Erroneous Ruling. Error
4 may not be predicated on an erroneous ruling acquiesced in by complainant. So held where, on the suppression of a deposition, the same was retaken.

EVIDENCE: Offers to Confess Judgment. Rejected offers to con-
5 fess judgment are not admissible in an action on the claim.

EVIDENCE: Relevancy. Evidence tending to show that preg-
6 nancy or change of life would render a person noninsurable is quite aside the mark, when the sole issue was whether insured knowingly deceived the insurer, by stating that she did not have an ovarian tumor.

INSURANCE: Reliance on False Representations. The insurer is
7 presumed to rely on a false and material representation of fact, touching the insurability of insured, and it is not error to state in the instructions the necessity for such reliance.

INSURANCE: Fraud in re Insurability—Instructions. On the is-
8 sue whether the insured had, by fraud, caused the examining physician to certify to her insurability, it is not error to instruct that the fraud must have been actually perpetrated: that is, the company must have been defrauded of its policy.

PLEADING: Amendment Amplifying Point. The allowance of
9 amendments which amplify points already sufficiently pleaded is discretionary with the court.

TRIAL: Permissible Argument. Argument will not necessarily be
10 condemned because couched in the form of forcible figures of speech.

WITNESSES: Instructions in re Credibility. Instructions are
11 properly refused which direct the jury to give the same weight to testimony of witnesses by deposition as to oral testimony of witnesses in open court.

TRIAL: Weight of Testimony. The jury may be directed, in 12 weighing testimony of statements of a deceased person, to give due consideration to the fact that it is incapable of contradiction.

Appeal from Marshall District Court.—B. F. CUMMINGS,
Judge.

MAY 15, 1920.

FROM judgment against it on a life insurance policy,
the defendant appeals.—*Affirmed.*

Goss & Rooney and *E. N. Farber*, for appellant.

F. M. Haradon, Carney & Carney, and *C. H. E. Boardman*, for appellee.

LADD, J.—I. The defendant issued its policy of insurance on the life of Marie P. Bohén, April 22, 1916. She died, July 3d following. This action was begun on June 27, 1917, and did not come on for trial until January 20, 1919. The defense interposed was that the report of the examining physician, representing the insured a fit subject for insurance, was procured by fraud.

Under Section 1812 of the Code, the insurer was estopped from setting up, in defense of the action, that the insured was not in a condition of health required by the policy when issued, unless it should be shown that the report of the medical examiner that she was a fit subject for insurance was procured by or through the fraud or deceit of the applicant. *Welch v. Union Central Life Ins. Co.*, 108 Iowa 224; *Roe v. National Life Ins. Assn.*, 137 Iowa 696; *Ley v. Metropolitan Life Ins. Co.*, 120 Iowa 203. It appears from the record that the insured's brother informed defendant's agent that she desired insurance, and that, on April 14, 1916, the agent obtained her application

1. INSURANCE:
fraud as to
physical insur-
ability: jury
question.

for two policies, one in favor of her father as beneficiary, in the sum of \$1,000, and the other in favor of her sister, plaintiff herein, as beneficiary, in the sum of \$1,500. The applicant was then 42 years old, and had never applied for insurance before. Among the numerous questions asked were the following:

"Q. How long since you have consulted or had the care of a physician, and for what ailments? A. Four years ago, had operation for hemorrhoids; entire recovery. Q. Name and address of physician. A. Mayo Brothers, at Rochester. Q. Have you ever had any of the following diseases: Enlarged glands, goiter, scrofula, cancer, growths, or tumors? A. No. Q. Have you ever had or suspected you had any diseases of the breast, uterus, or ovaries? A. No."

On the 24th day of June following, at Rochester, Minnesota, a surgeon, William J. Mayo, removed from her a large tumor, with a part of the womb, in which it was growing. "Anatomically," as he testified, "it would be described as the removal of all the womb, excepting the neck, and the tumor which it contained." This tumor was attached to a part of the uterus, and was about the size of a foetus six months advanced, and she appeared enlarged about as a woman would when six months pregnant. The patient died, after she had left the hospital, but while she was still under observation. The witness was unable to say absolutely whether there was any connection between the operation and her death. Though feeling perfectly well, as was made to appear, she suddenly fell dead. The doctor observed that:

"Many women come in here with tumors like that, and don't know anything about it. Never discovered it, until it is found on the table. All the physical signs that would be noticeable by the patient would be the enlarged abdomen."

It was admitted that, if Dr. Berkman were present, he would have testified that he was on the diagnosis staff of the Mayo Clinic at the time, and examined the insured, June 13, 1916; that she then stated to him that, approximately two years previous, she had noticed "some sort of growth or enlargement in the lower part of the abdomen, which persisted, and, about a year after first noticing this, she went to a physician for an examination;" that the physician told her she had a tumor of the womb, about the size of an orange; that she stated that the growth had been persistent, and she thought it had greatly increased in size; that she "had some little ache and bearing-down sensation in the right lower abdominal region, coming on at times when she was nervous, tired, and worn out;" that, upon examination he discovered a tumor, which was of fibroid nature, connected with the uterus, which he outlined as "extending practically up to the level of the navel,—roughly, as large as a newborn infant's head;" that there was nothing else in her physical condition, with the exception of a slight valvular heart murmur, discovered not to be indicative of anything; that she had had two other examinations at the Mayo Clinic, one for an indeterminate heart condition, at which, on examination, nothing significant was found, the other time, for hemorrhoidal condition, for which she underwent an operation; that the operation on June 24, 1916, was in the nature of a "sub-total abdominal hysterectomy for fibroid uterus; that the cause of her death was pulmonary embolism."

"Q. Doctor, what, if any, relation was there between the embolism described and the operation in question?
A. A distant connection, not relative to the character or site of operation nor the technique."

He, as well as another physician who answered in response to a hypothetical question, was of the opinion that the tumor must have existed at least a year prior to the

operation. The examining physician explained that he did not make a physical examination of the applicant for growths or tumors, for the reason that she answered the inquiry made that she had none; that he took her word; and that, had she disclosed that she had trouble there, he would have given her a physical examination, and ascertained her condition. A case was made out for the jury. That body might have found, from the evidence recited above, that the insured knew that she was afflicted with a tumor; that, notwithstanding such knowledge, she denied having it, in her answer to the medical examiner; that he was deceived thereby into making his report, when, had she answered truly, he would not have made the report as he did, but would have ascertained the truth, and have reported her true condition to the company, and the policy would have been refused. The record leaves little or no doubt that she was not a fit subject of insurance, at the time of the application, or at the time of the issuance of the policy. The only fairly debatable question is whether she knew this,—that is, was aware of the existence of the tumor, at the time of her medical examination, and purposely misled the examining physician into recommending her as a fit subject of insurance to the defendant company. Fraud is never presumed, but is always to be proven. She denied having a tumor, in answer to the question by the medical examiner. That she might have been so afflicted, without knowing it, appears from Dr. Mayo's testimony. Dr. Berkman swore that she had told him that she had noticed, about two years before the examination, a growth or enlargement in the abdomen, which persisted, and that a physician had advised her, about a year before, that she had a tumor about the size of an orange. As only the two were present at the conversation, and the patient's lips were closed by death, his testimony of her declarations is to be scrutinized cautiously, and it, as well as his credi-

bility, tested as ordinarily is done under like circumstances. See *Holmes v. Connable*, 111 Iowa 298; *Watson v. Richardson*, 110 Iowa 673. The evidence was of alleged statements on the part of deceased. Such testimony is subject to imperfection and mistake, resulting from misunderstanding or imperfect memory as to what was, in fact, said, or misinterpretation of the words uttered, or their meaning as actually spoken. For these reasons the case is to be distinguished from *Pumphrey v. Walker*, 71 Iowa 383, and *Mahoney v. Dankwart*, 108 Iowa 321, as well as *Lavallee v. Hahn*, 167 Iowa 269. *Kauffman v. Logan*, 187 Iowa 670, where the witness' testimony was regarded as conclusive against a mere presumption, in other respects differed from the case at bar. See *Sonnentheil v. Christian Moerlein Brewing Co.*, 172 U. S. 401 (43 L. Ed. 492). The record was such as to carry to the jury the issue whether insured knowingly deceived the examining physician as to the existence of the tumor.

II. A policy in the sum of \$1,000, naming Edward B. Bohan as beneficiary, was issued on the same application as that in suit, and, in the second division of the answer, appellant so alleged, and that said policy

2. **INSURANCE:**
evidence as to
fraud in re
insurability. was procured in the same way as alleged in this suit, and further, that, upon the tender of the premium paid, the beneficiary

surrendered the policy to the company. This last part, with reference to the surrender of the policy and the tender of the premium, was stricken out, on motion of the plaintiff. The ruling, though complained of, was correct. Whatever Edward B. Bohan did with his policy was without probative force as to whether it was procured by deception or not, and was not a circumstance bearing on the issue of fraud to be considered by the jury. The ruling has our approval.

III. At the beginning of the world war, Dr. Berkman, who had examined deceased at Rochester, Minnesota, entered

the army as surgeon, with the rank of captain, and was first stationed at Fort Riley, Kansas. The de-

3. DEPOSITIONS :
oral taking defendant moved for an order directing the
outside state taking of his deposition orally. Such an
not permissible. order was entered; but, before the depo-

sition was taken, he was transferred to Atlanta, Georgia, and, on motion, the order was modified accordingly, the deposition taken on oral interrogatories, and filed January 18, 1919. The order, as well as the modification, was entered over the objections of plaintiff, and the latter especially insisted that the court was without authority to order the evidence to be taken orally outside of the state. On this and other grounds, plaintiff moved to suppress the deposition. The motion was sustained, and of this ruling defendant complains.

The power to issue commissions for the taking of depositions has long been regarded as inherent in a court of equity, unless limited by statute; but it is well settled that, at common law, courts at law had no authority to issue commissions to take the testimony of witnesses *de bene esse*. Litigants were compelled to resort to chancery, or obtain the consent of the adverse party, to procure the testimony of witnesses abroad by depositions. To remedy this inconvenience, statutes have been passed in this and other states, providing for taking of depositions of nonresidents of the state, and the authority so to do rests solely upon these statutes. *Missouri & N. A. R. Co. v. Daniels*, 98 Ark. 352 (136 S. W. 651); *Paddock v. Kirkham*, 102 N. Y. 597 (8 N. E. 214); *International Coal Min. Co. v. Pennsylvania R. Co.*, 214 Pa. 469 (63 Atl. 880); *Simpson v. Carleton*, 1 Allen (Mass.) 109 (79 Am. Dec. 707); *Kaelin v. Commonwealth*, 84 Ky. 354 (1 S. W. 594). See *Russell v. Fabyan*, 35 N. H. 159, where the courts exercise the power, supposedly in consequence of a statute conferring on the superior court of that state "all power, jurisdiction, and authority

of the courts of King's Bench, Common Pleas, and Exchequer in England," the latter possessing all the powers of a court of chancery as to taking depositions. See, also, 18 Corpus Juris 606, and cases cited in note.

Our statutes very fully cover the taking of depositions of nonresidents; and, without expressing an opinion as to whether a commission may be ordered in a chancery suit, to take the depositions on oral interrogatories of a witness outside of the state, we have no hesitation in holding that the court is limited to the method the statutes prescribe, in actions at law. In the absence of an agreement to the contrary, written interrogatories are to be filed and served on the opposite party, as provided in Section 4689 of the Code, and, if no cross-interrogatories are filed by the party, the clerk of court is required to submit the interrogatories, as directed in Code Section 4692. The adverse party may, upon serving notice as required, appear and orally cross-examine the witness, and, if the adverse party elects to examine the witness orally, the party suing out the commission may waive his written interrogatories, and appear and orally examine. Section 4693 of the Code. Only as so provided may depositions be taken orally, in part or wholly, save by consent, beyond the borders of the state, and we are of the opinion that the court erred, both in entering the order and in modifying it, so as to require the depositions of Dr. Berkman to be taken on oral interrogatories in another state, more than 1,500 miles from the place of trial. The above orders were entered by a judge other than the one presiding at the trial, and the ruling subsequently entered, suppressing the deposition, has our approval.

4: APPEAL AND
ERROR :
acquiescing in
erroneous ruling.

Even though the ruling in suppressing the deposition had been erroneous, the defendant waived the error by acquiescing therein. It procured, on its application, a continuance, to enable it to take the deposition

over on the 2d of September, 1918, and, on October 17th following, another application for continuance was filed, and ruling thereon postponed, because of the discharge of the jury. On January 11, 1919, the court sustained this last motion, and, shortly thereafter, the plaintiff admitted that the witness, if present, would testify as set forth in the motion, and that portion was read to the jury at the trial. By moving for a continuance, to permit the taking of the deposition over, and later availing itself of what the witness would have sworn to, the defendant necessarily acquiesced in the order suppressing the deposition previously filed, and error might not be predicated on the order suppressing.

IV. The agent who obtained the application testified that he tendered a draft for \$28.59 to the plaintiff. Counsel then remarked:

"For the purpose of examining this witness, the defendant offers and reads in evidence Exhibit 4, the draft identified."

An objection as incompetent and immaterial to any issue, and that the draft did not constitute a tender, and that the matter was covered by the pleadings, was sustained

5. EVIDENCE :
offers to confess judgment.

"in view of the statement made at the opening of the case." The ruling was correct, if for no other reason than that it was not

necessary that the draft be read, in order to enable counsel to examine the witness. The return of a like amount had been tendered in the answer, with interest from the time the premium on the policy had been paid, including the court's costs up to that time, and an offer to confess judgment therefor. The plaintiff had declined the tender, and refused to accept the offer to confess judgment; and, under Section 3817 of the Code, this might not be given in evidence. We know of no issue on which the evidence would have had any bearing. If the policy was

procured by fraud, judgment must have been entered on the offer to confess judgment against defendant and against plaintiff for costs subsequently accruing; if the policy was not procured by fraud, judgment must have been entered as prayed.

V. The examining physician testified that, had the applicant's answers disclosed the existence of a tumor, or indicated that there might have been such an ailment, he would have required her to undergo an examination, to ascertain what the trouble might be, and the report would have so represented, and he would not have made the report such as was submitted to the company. He was then asked:

6. EVIDENCE:
relevancy.

"You may state whether or not, if, instead of the answers to those parts, of Questions 12 and 15 being all in the negative, they or any part of them had been in the affirmative, disclosing that this applicant had any of the diseases or disability inquired about, whether she would have been, in your opinion, an insurable risk."

This question was objected to as incompetent, immaterial, a mere conclusion of the witness, and not within the issues. The objection was sustained. That part of the question under Question 12 was that relating to the tumor. The questions a, b, and f, of Question 15, were as follows:

"a. Have you ever had or suspected that you had any disease of the breast, uterus, or ovaries? A. No." "b. Have you had change of life: if so, when? A. No." "f. Are you now pregnant? A. No."

No complaint is made because of falsely answering as to her change of life or pregnancy, and, therefore, the question as to each of these was immaterial. Nor was there any proof tending to show that she falsely answered the question as to pregnancy. Whether a tumor attached to the uterus is to be classified as a disease, we are not advised by the record. The only issue raised on which there was

evidence was whether she had a tumor, and she answered that she did not have one. We think it was improper to call for an opinion of the witness as to whether, if the applicant had been suffering from a disease of the breast or ovaries, or had had change of life, or had been pregnant, she would have been an insurable risk, because these issues were not involved in the case. There was no error in sustaining the objection. The physician had previously disclosed that, had she answered with respect to the tumor in the affirmative, he would have examined the applicant, and reported whatever facts he ascertained to the company. This is all he was prevented from doing by the applicant's answer. The report would have conveyed to the company the facts as he ascertained them, and would have been such a report as contemplated by Section 1812 of the Code. *Boulting v. New York Life Ins. Co.*, 182 Iowa 797. The parties seem to have assumed that the existence of a tumor such as was removed would render her a noninsurable risk, and we think that the evidence fully justifies such an assumption.

VI. In the fifth paragraph of the charge, the court instructed that, in order to make out a defense, (1) there must be a material representation of an existing fact, (2) charge was false, (3) so known to be, (4) made with intent that defendant rely thereon, (5) that its examining physician relied and acted thereon, and (6) that the company was thereby defrauded. The exception is that the fifth and sixth divisions required a greater amount and degree of proof than exacted by law; that only a finding that the examiner's report was procured by fraud was essential to constitute a defense; and that no fraud would occur until money had been collected on the policy. Upon report to the company by the medical examiner, it was estopped from setting up, as a defense to the action on the policy, that the assured was not in a condition required

7. INSURANCE:
reliance on
false representations.

by that instrument at the time of its issuance, unless the report was procured by or through fraud or deceit of the insured. Section 1812 of the Code. Upon such finding, said estoppel is removed; but this alone does not constitute a defense. It merely removes the barrier to prove that the insured was not in a condition of health required by the policy at the time of its issuance. But this defense might not be made out if, in issuing the policy, the company did not rely upon the insured's being in a condition such as that instrument required. Thus, if it were issued with knowledge on the part of the company that she had a tumor, the evidence thereof would not defeat the policy; for, in such event, it must have found her an insurable risk. There was no error, then, in exacting a finding that the company, as well as the examining physician, relied upon the representation with respect to the existence of the tumor, though such requirement might well have been omitted; for the company is presumed, in the absence of any showing to the contrary, to have acted in reliance on the report or certificate of the examining physician, when it issued its policy.

The sixth division is criticised for that, as is said, "no actual defrauding of defendant company, except through its examiner, would occur, until something was collected on the policy." Unless the deception alleged to have been practiced on the physician was effective in procuring a report from him to the company which otherwise would not have been obtained, and a policy based thereon, there was no fraud perpetrated. In other words, the fraud must have been accomplished, in order to be actionable. One may intend to defraud, or may actually deceive; but, if the object is not accomplished,—that is, the proposed fraud not consummated,—an action for fraud may not be maintained. As the physician's report was made and the policy issued, there was no occasion for submitting to the jury that the

8. INSURANCE:
fraud in re
insurability:
instructions.

defendant must have been defrauded. On the other hand, it was not error to instruct that the fraud must actually be perpetrated: that is, the company must have been defrauded of its policy by the applicant.

VII. After both parties had rested, the defendant filed an amendment to its answer. The court sustained the motion to strike, on two grounds: (1) That amendment was not necessary for the submission of the issues in the case; and (2) because it was filed too late. Though alleging more particularly the alleged perpetration of the fraud, this was sufficiently specific in the answer, and there was no occasion for the amendment. Striking it from the files was discretionary. Nor was there any abuse of discretion in refusing to recall the examining physician, "to amplify the testimony already introduced," and to testify concerning an undisclosed point which counsel thought he had overlooked. No sufficient ground for opening the case was suggested, and the court did not abuse its discretion in refusing to allow further examination of the witness.

VIII. The appellant also objected to the argument of plaintiff's counsel, in which the latter remarked that he did "not want the jury, at the instance of any insurance company, to write an epitaph upon the tombstone of Marie P. Bohen that she was a cheat and a fraud." This merely suggested somewhat forcibly the consequence of an adverse conclusion by the jury, and the attorney was within the rule which does not require him to forego all the embellishments of oratory, or to leave uncultivated the fertile field of fancy. *State v. Burns*, 119 Iowa 663.

IX. Complaint is made that the court gave the tenth instruction, instead of the fourth, requested by the defendant. In the latter, the jury would have been told, had it

9. PLEADING:
amendment
amplifying
point.

10. TRIAL:
permissible
argument.

11. WITNESSES:
instructions
as to credi-
bility.

been given, to give the same weight to the testimony of witnesses contained in depositions as they would if by the witnesses in open court. This would not have been correct; for the jury may, where the testimony is taken orally, consider the attitude of the witness while testifying, and this might not be done when the testimony is by deposition.

12. TRIAL:
weight of
testimony.

In the tenth instruction, the court pointed this out, and added that the jury might consider the reasonableness or unreasonableness of their testimony, and also that the lips of the insured were closed by death, and that any statement she was said to have made could not, in the nature of things, be contradicted. Contrary to the contention of appellant, this cannot be construed as an appeal to sympathy, or as reflecting on the witnesses Mayo and Berkman, or questioning the truth of their testimony; but it did require their testimony to be subjected to precisely the same tests as that of other witnesses under similar circumstances. There was no error in so doing. The eighth instruction is criticised, but no exception was made thereto in the trial court.

What we have said disposes of all questions designated by appellant as "the principal matters complained of," and others. Still others are suggested; but, as none of these are fairly debatable, we are content in saying that such rulings have our approval. The motion of appellee, for the assessment of penalty, is overruled.—*Affirmed*.

WEAVER, C. J., GAYNOR and STEVENS, JJ., concur.

CEDAR RAPIDS COLD STORAGE COMPANY, Appellant, v. ANNA
R. LESINGER et al., Appellees.

FORCIBLE ENTRY AND DETAINER: Enforcement of Order
Against Stranger. A judgment of removal in forcible entry and
detrainer proceedings may not be enforced against one who, at
the time of the commencement of the proceeding, and at the
time of the attempted enforcement of the judgment, was in
actual possession of the property, and had never been made a
party to the proceedings.

Appeal from Cedar Rapids Superior Court.—ATHERTON B.
CLARK, Judge.

MAY 15, 1920.

ACTION to restrain the enforcement of a judgment for
forcible entry and detrainer, on the ground that the plaintiff
was in the actual possession of the premises at the time the
judgment of ouster was entered, and was not made a party
to the proceeding, and had no notice of the proceeding, and
that its rights, therefore, were not adjudicated and deter-
mined. Judgment for the defendant in the court below.
Plaintiff appeals.—*Reversed.*

W. J. Barngrover, for appellant.

Barnes, Chamberlain & Hanzlik, for appellee.

GAYNOR, J.—This action is in equity, to restrain the
defendant from enforcing against the plaintiff a judgment
of ouster, obtained by her in a justice court, in a proceeding
for forcible entry and detrainer, in which she was plaintiff,
and one William Tehel was defendant.

We may assume that defendant rented the premises in
question to William Tehel; that, thereafter, she instituted
proceedings for forcible entry and detrainer against him in
justice court, and obtained judgment against him for the

possession of the premises in controversy; that a writ of ouster issued upon said judgment, directing the proper officer of the court to remove Tehel from the premises. It appears, however, that the rental accruing after the lease was made, was paid by checks signed by this plaintiff. The undisputed evidence shows that, immediately after the premises were leased to Tehel, the plaintiff, a corporation, went into possession, and has occupied the same ever since, and was in the actual possession at the time defendant brought her suit against Tehel; that it furnished and used the premises for the purpose of carrying on the business in which it was engaged; that all the property on the premises during the lease was the property of this plaintiff, and that Tehel was simply the president, treasurer, and local manager of the plaintiff corporation.

It is conceded in this record that no notice was served on the plaintiff to terminate its right of possession, if any right it had. It is conceded that no suit was ever brought against this plaintiff to oust it from the possession of the premises. It was not made a party to the suit brought against Tehel, and was not served with any notice requiring it to appear and defend against that suit. The only notice served, in the forcible entry and detainer proceedings, was a notice on Tehel, but not served on him as an officer of the defendant company. In that proceeding, Tehel alone appeared. Tehel alone defended, and the judgment of ouster was against Tehel alone. It is conceded that plaintiff was in possession at the time this suit was brought, and is still in possession, claiming some right to possession. Whatever right it had or has to the possession has never been terminated by statutory notice, or by any legal proceedings. The action for forcible entry and detainer does not involve a question of title. It involves only the question of possession, and the right to possession. One in possession of real estate, whether his possession be right-

ful or wrongful, cannot be ousted under proceedings for forcible entry and detainer, except by compliance with the requirements of the statute. The remedy is statutory, and is allowable only:

"1. Where the defendant has by force, intimidation, fraud or stealth entered upon the prior actual possession of another in real property, and detains the same;

"2. Where a lessee holds over after the termination or contrary to the terms of his lease;

"3. Where the defendant continues in possession after a sale by foreclosure," etc. Section 4208, Code, 1897.

Before this action can be brought, in any except the first of the above cases, three days' notice to quit must be given to the defendant in writing. The action must be by petition, which must be sworn to, and the time for appearance must be not less than two nor more than six days from the completed service of notice, except where the action is brought in the district or superior court. If the defendant is found guilty, judgment shall be entered that he be removed from the premises, and that plaintiff be put in possession thereof, and the execution for his removal shall issue, to which shall be added a clause commanding the officer to collect the costs, as in ordinary cases.

In *State v. Smith*, 101 Iowa 369, this court held that a writ against one person, claiming as tenant, will not be valid as against another person, claiming as an underlessee from such tenant, if the underlessee was in possession before the commencement of the proceeding.

It is elementary that no one is bound by a judgment obtained in a proceeding to which he is not a party. A corporation is a distinct, legal entity, distinct from that of its officers. There is a clear distinction between the binding force of a judgment irregularly obtained and the binding force of a judgment to which one is not made a party. Where one is a party to a proceeding, and judgment

is irregularly obtained, and a suit in equity is brought to restrain the enforcement of the judgment, the party seeking to evade the effect of the judgment on account of the irregularity must show that he has some defense to the judgment which would be available to him in the event that the right involved in the judgment were sought to be enforced against him. A court of equity does not interfere with judgments at law unless the complainant has an equitable defense of which he could not avail himself at law, because it did not amount to a legal defense, or had a good defense at law which he was prevented from availing himself of, by fraud or accident, unmixed with negligence. Here, the defendant was seeking to enforce process against this plaintiff, issued upon a judgment to which this plaintiff was never made a party. Through such process, the defendant was seeking to deprive the plaintiff of the possession of premises to which defendant's right of possession had never been adjudicated or determined. Defendant never had this plaintiff in court on its right to the possession of the premises in controversy. The court, therefore, should have sustained the contention of the plaintiff, and restrained the defendant from enforcing the process issued in the action of forcible entry and detainer, in so far as this plaintiff was concerned, and should have restrained the defendant from removing the plaintiff from the premises in controversy, under the process issued upon the judgment against Tehel, on the simple ground that the plaintiff was not a party to said judgment, had no notice of the proceeding that led up to the judgment, was in actual possession of the premises at the time forcible entry and detainer proceedings were commenced, and was still in possession, with his right to the possession not determined.

For the reasons aforesaid, the judgment of the superior court is—*Reversed*.

WEAVER, C. J., LADD and STEVENS, JJ., concur.

DEVONIAN PRODUCTS COMPANY, Appellee, v. CLEMENT L.
WEBSTER, Appellant.

CORPORATIONS: A corporation which issues its stock to one who is, in fact, an expert mineralogist, in consideration that such expert will perform for the company expert services in the science of mineralogy, may not, when such services are actually rendered, thereafter have the stock canceled, on the ground that the recipient of the stock was guilty, prior to the employment, of false representations *as to the manner in which he became such expert.*

Appeal from Floyd District Court.—C. H. KELLEY, Judge.

MAY 15, 1920.

ACTION in equity to cancel certain shares of stock issued to the defendant, on the ground that they were fraudulently obtained. Decree for the plaintiff in the court below. Defendant appeals.—*Reversed.*

H. J. Fitzgerald, J. C. Campbell, and W. M. Brouillard,
for appellant.

W. G. Henke, Daucley & Jordan, and H. L. Lockwood,
for appellee.

GAYNOR, J.—This is an action in equity to cancel 20,000 shares of stock issued by the plaintiff company to the defendant. The par value of the stock was 25 cents per share. The stock was issued by the Interstate Investment & Development Company, the name of which was afterwards changed to the name in which this suit is brought. The prayer for the cancellation of the stock is based upon a claim that the same was procured by the defendant through false and fraudulent representations.

It appears that, some time in the early part of 1903, the defendant conceived the idea of organizing a company,

the object and purpose of which would be to prospect for, locate, purchase, lease, or otherwise acquire lands, mines, mineral claims, oil lands, coal mines, or any other property, to buy, sell, mortgage, and convey land or other property, and to do all acts necessary to the full carrying out of its object; that to this end he interested certain persons residing in and about Charles City, to wit, C. P. Leland, C. F. Morris, T. E. Hirsch, G. W. Von Berg, and C. E. Sheldon; that, in the conversations had with these people, he represented "that he was a professor of science, that he was a scientific expert of high standing in the scientific world, that he had a thorough knowledge of geology and mineralogy, and was scientifically acquainted with the possibilities of the west, and also that he had an acquaintance with mining methods and indications of ores, coal, oil, etc., and that such acquaintance and such knowledge as he possessed was equal to that possessed by any other man, that he was a graduate of the universities of high standing, that he had completed in universities of high standing the course required in the development of a mining engineer and geologist, that he had completed in universities and colleges of high standing the work required by the curriculum as preliminary to the bestowal of the degree of Master of Science." It appears that these parties became interested in the proposition, and thereafter organized themselves into a corporation, the object and purpose of which, as recited in the articles of incorporation, was "to prospect for, locate, purchase, lease, or otherwise acquire lands, mines, mineral claims, oil lands, coal mines, or other property, and to buy, sell, mortgage, and convey lands or other property, and to do all acts necessary to the full carrying out of that project." The capital stock was fixed at \$50,000, divided into shares of 25 cents each, par value. The place of business was fixed at Charles City. The articles provided for a president, first and second vice-president, secretary and treasurer, and a scientific expert

just when dividends will be paid. It is to be hoped very early," etc.

It does not appear definitely by whom this circular was prepared or issued. We take it, however, that it was issued by authority of the company. The same names appear at the head of the circular that appear in the articles of incorporation. It does not appear just when this circular was issued, but, we take it, soon after the corporation was organized, and while the original incorporators were officers of the company. The principal part of plaintiff's business, after its organization, seems to have been the selling of stock. One of the original incorporators testified for the plaintiff that, at the first meeting, May 7th, after the incorporation:

"We were willing to share in any scheme that would bring in quick and ready returns. At the second meeting, we paid in \$10 apiece, to get in on the ground floor, and for the purpose of getting incorporation papers. At that time, we were all looking out for our interests, and not for the interests of the stockholders. We had a meeting on June 25, 1903, and the principal talk at that meeting was to get the scientific expert out for some proposition that we could make money out of. Our scheme was not to take over developed properties; but, if Mr. Webster discovered valuable property, we would lease it and take an option on it. We told Mr. Webster to go out and see what he could find. He went, and reported back that he had discovered some sage brush potash. [It appears, however, that nothing came of this.] I don't recall that the board gave Mr. Webster any directions as to research, other than this testified to. I don't remember Mr. Webster's ever refusing to do as the board directed. Mr. Webster did not ask for the last issue of stock until 1907. On January 4, 1907, the board voted to issue to the defendant the balance of the 20,000 shares, 115 shares having been issued on March 12, 1904. The same was issued in consideration of services rendered to the company in

the amount of \$5,000, being the par value of the stock. I was secretary at the time. We first decided that we didn't need the services of the scientific expert after Mr. Webster opposed a deal contemplated between the plaintiff and a company known as the Radio Company. Mr. Webster never declined to act as scientific expert, up to the time we discharged him. The statements of Webster as to his qualifications and training were made several months prior to the organization of the company. I don't remember that Mr. Webster made any statements concerning his education or qualifications at the board meeting at the time the company entered into the contract with him under which he was to receive the 20,000 shares of stock. The contract under which he was to receive these shares was presented at the meeting by either Hirsch or Leland. It was read and voted on. Mr. Webster said nothing about the contract at the meeting. Mr. Leland had more to do and say than any of the others at the meeting, and he was the ruling hand of the corporation. Mr. Webster never had much to say at the meetings. Leland and Hirsch talked very strongly 'easy money,' when the corporation was organized. We all entered into it with the idea of getting easy money."

Touching the making of the contract with the defendant, we quote from the minutes of the meeting of June 4, 1903:

"The organizers all met in regular meeting, first discussing the work of the scientific expert and the conditions under which he is to work. The following points were agreed upon: The present scientific expert, C. L. Webster, shall receive, without cash consideration, 20,000 shares of our capital stock, also \$3.00 per day and all necessary expenses of travel, transfer, board, and lodging, while actually employed in the business of the company. In return for this, the said Webster shall give his full time and his best efforts for the

promotion of the company's interests, in that he shall fully employ his time and strength in finding and securing, *under the direction of the board of directors*, valuable mineral properties of various descriptions, such as gold, silver, copper, iron, or coal mines, oil lands, and any other property whatsoever; that he shall seek to interest parties in properties heretofore named, with a view of selling said properties at the greatest possible profit to the said company. In doing this work, it is understood that the said expert shall ordinarily only act *under the orders of the board of directors*, though exceptional cases may arise when it will be necessary to act without delay, and this shall be allowed him if, in his judgment, there is but one profitable course open in the premises. Regular reports of his work shall be forwarded by him to the secretary. It is also understood that the said Webster shall give his whole time under this contract for the period of 10 years, *provided he is annually re-elected to his office at the regular election as provided by the by-laws of the company.*"

One of the officers of the company testified:

"Mr. Webster went out west, and reported a potash proposition and some mining propositions and a summer resort out in the mountains. None of these propositions were tangible. There was an attempt made to sell the potash proposition, but it was not put in such form as to make it tangible, and nothing ever came of it. At the time we sent him out, Mr. Webster's scientific ability and \$85.00 was all there was to the company. Mr. Webster wrote us, when he was out west, as to what he was doing. We considered it best to try and sell the potash proposition. Went to Chicago for that purpose."

Another witness testified that, prior to the issuance of the stock to him, the defendant had submitted to the company propositions that had been accepted, and the potash proposition, which they tried. He had submitted a great

he had completed, in universities of high standing, the courses required in the development of a mining engineer and geologist; that he had completed in universities and colleges of high standing the work required by the curriculum as preliminary to the bestowal of the degree of Master of Science."

The right to cancel this contract is predicated on the sole ground that the representations herein set out were not true; that the defendant was not an expert mineralogist; that he did not have a thorough knowledge of geology and mineralogy; that he was not acquainted with the possibilities of the west; and that he had no acquaintance with mining methods by which ores, coal, oil, etc., could be ascertained. We may concede, for the purposes of this case, that the defendant made these statements; that he was not a graduate of any university; that he had not taken the course required in the development of mining engineers and geologists; that he had not completed in any university or college the work required by the curriculum as preliminary to the bestowal of the degree of Master of Science: yet we cannot concede that he was not a practical expert in these lines. The question that concerned his employers did not depend upon the source from which he acquired his knowledge, so much as it did upon the fact of knowledge. It is true that colleges and universities teaching these branches of science enable a student to more quickly acquire the fundamentals upon which to build, but the building process is purely personal, and may be acquired and possessed without the aid of these institutions. When one has the aptitude, the industry, access to books of learning upon these branches, and practical experience, he may become expert in these lines without the aid of these institutions. Resort may be had to

"Those ancient teachers, never dumb,

"Of nature's unhouse'd lyceum."

We do not think the record would justify us in saying that this man did not have the capacity, the qualifications.

the learning, and the ability to discharge all the duties which he assumed, and which, by reason of his employment, plaintiff was justified in calling upon him to perform. He was not dealing with ignorant men—men unacquainted with science and books. Though they were not, perhaps, skilled in this particular line of science, they were skilled in the way of the schools. This plaintiff has permitted him to act in the capacity of expert engineer during all these years. After he had severed his connection under this contract, he was re-employed by the directors of this company, following methods which the company itself had adopted in the management of its business. The record fails in any place to show that he did not respond willingly and fully to any service which the corporation called upon him to perform, in the line of his employment. Not all the sins of omission and commission of this corporation ought to be laid upon this defendant.

Nowhere in plaintiff's petition is it urged that its act in issuing this stock was *ultra vires*. Nowhere is it claimed that it was not authorized to issue the stock in pursuance of the contract made. Such issues were not tendered. It predicates its right to cancel this stock upon the fact alone that the defendant misrepresented his qualifications to the promoters of this concern, and on that theory alone. There is no claim that he did not perform the services fully called for by his contract. No such issue was tendered. It is not claimed that he did not earn the \$5,000 represented by the stock, assuming that he was capable and qualified to discharge the duties of an expert mineralogist. The right of the corporation to enter into the contract, the right of the corporation, as such, to issue the stock, in consideration of performance of the conditions of the contract, is not questioned in any pleading. The right to cancel the contract—if any right exists in this suit—must rest upon the allegations made in the petition upon which the right is predicated. The

services contracted for have been performed. The contract on the part of the plaintiff has been executed. The plaintiff cannot repudiate it at this time. See *Church v. Johnson Bros.*, 93 Iowa 544; *Lucas v. White Line Trans. Co.*, 70 Iowa 541; *Fidelity Ins. Co. v. German Sav. Bank*, 127 Iowa 591. Plaintiff has received and is holding the consideration for which this stock was issued. It has shown no legal or equitable ground upon which it is entitled to the relief prayed for. We think the court erred in finding for the plaintiff, and its action is—*Reversed*.

WEAVER, C. J., LADD and STEVENS, JJ., concur.

IN RE PROBATE OF WILL OF ANNA KIELSMARK.

ELIAS P. BIEBER, Appellee, v. HANS IVERSEN et al., Appellees; A. MITCHELL PALMER, Alien Property Custodian, Appellant.

WILLS: Validity of Devise to Alien Enemy. A devise to an alien enemy is valid, but the court will retain jurisdiction over the property until peace is declared.

Appeal from Grundy District Court.—CHARLES W. MULLAN, Judge.

MAY 15, 1920.

ACTION to probate a will. The sole question presented is whether or not a devise of property to an alien enemy is in contravention of the public law and the act of Congress referred to in the opinion. The invalidity of the devise was raised by heirs residing in this country. The court held the devise invalid. Appeal to this court. The opinion states the facts.—*Reversed and remanded*.

Williamson & Willoughby and *Emmet Tinley*, for appellant.

A. G. Briggs and *Briggs, Thygeson & Everall*, for appellees.

GAYNOR, J.—Anna Kielsmark died on the 7th day of August, 1917, testate, leaving surviving her, as her only heirs at law, the following named persons: Marie, Elizabeth, Peter, and Christian Vodder, children of a deceased sister, and Hans and Oluf Iversen, children of another deceased sister. On the 15th day of August, 1917, an instrument purporting to be her last will and testament was filed in the district court of Grundy County, Iowa, for probate. The Vodders were all born in Germany, and, during all the times hereinafter mentioned, were actual residents and citizens of Germany, and are still residents and citizens of Germany. Hans Iversen and Oluf Iversen are residents of the United States, residing at St. Paul, Minnesota. Hans Iversen, at the time of the filing of the will, had declared his intention to become a citizen of the United States, but had not been naturalized. It does not appear whether Oluf had declared his intention to become a citizen or not.

War was declared by the United States against the imperial German government on the 10th day of April, 1917.

On the 24th day of July, 1917, the will was made, and on August 15, 1917, was filed for probate. On the 2d day of January, 1918, Hans Iversen and Oluf Iversen appeared, and filed objections to the probate of the will, on the ground that a state of war existed between the United States of America and the imperial government of Germany at the time the will was made, and still exists, and that the parties named in the will as beneficiaries, to wit, Marie and Elizabeth Vodder, were and are alien enemies. On these facts, objectors predicated a claim that the bequest to these Vodders was absolutely void, and that, as to the property

attempted to be devised to them, Anna Kielsmark died intestate.

The will, so far as material to this controversy, recites:

"That I, Anna Kielsmark, of the town of Reinbeck in the county of Grundy, in the state of Iowa, being of sound mind, etc., do here make, execute, publish and declare this my last will and testament.

"1st. I provide that all my just debts and expenses be paid out of my estate.

"2d. A bequest of \$100 to the Ladies' Aid Society of the Congregational Church.

"3d. Instructions to the executor to hold \$100, invest the same and pay the income each year therefrom to the Reinbeck Cemetery Association for the purpose of keeping up her burial lot in the cemetery.

"4th. [The clause in controversy.] I have two nieces at this time in Germany, to wit: Miss Elizabeth Vodder and Miss Marie Vodder and I hereby instruct my executor to communicate with them as soon as possible in case they shall not have arrived in Reinbeck prior to my death; he shall invite them to move to Reinbeck; in case they or either of them, come, they shall have the home in Reinbeck, being the only real estate in the said town of Reinbeck, in Grundy County, Iowa, and I hereby give the same to them, together with all the furniture and personal effects therein; *my executor shall hold the said property and care for the same until they come, or until five years from the close of the present European War*, and if he hears from them, and they or either of them, come to Reinbeck to live, she or both of them, shall have the said home in absolute title; in case he hears from them and they neither of them desire to come to America, then he shall sell the said house and the proceeds thereof shall be divided between them and he shall also pack up my smaller effects and send to them. In case either of said nieces shall not be living at that time, then the survivor

shall take half the said property, and the remaining half shall be divided between the persons named in the next paragraph."

The next paragraph provides for the disposition of the property in the event the two Vodders named in the will are dead.

Elizabeth and Marie Vodder were both living at the time the will was offered for probate, and at the time of the trial. So far as this controversy is concerned, all the facts material were stipulated between the parties. The stipulation shows the facts above recited, and that, during all of the time mentioned, Elizabeth and Marie Vodder were and still are alien enemies of the United States of America, residents and citizens of Germany; that testatrix, Anna Kielsmark, resided in the town of Reinbeck, in Grundy County, at the time of her death; that she had lived there for something more than 30 years, and was a citizen of the United States. Upon the hearing, A. Mitchell Palmer, alien property custodian, appeared by attorneys Williamson & Willoughby, and joined with the proponent in an effort to have the will probated and made effectual. The court, upon the final hearing, found the facts as herein recited, and concluded therefrom that any attempt on the part of Anna Kielsmark to devise to these nieces any part of her estate was an attempt to furnish aid and comfort to the enemy, and that, therefore, the provision of the will by which the property of the testator was attempted to be given to Elizabeth and Marie Vodder was and is void. The will in all other respects was upheld. The decree recites that the entire estate, except the bequests in the second and third paragraphs, descended to the legal heirs of Anna Kielsmark on her death, according to their respective shares, as fixed by the statute of the state of Iowa; that Hans Iversen and Oluf Iversen, being residents of the United States, were entitled to have paid over to them by the

executor the shares of the estate of the testatrix to which they are respectively entitled, as heirs at law; that the shares of Marie, Elizabeth, Peter, and Christian Vodder, as heirs at law, should at once be taken possession of by the alien property custodian, and dealt with according to the laws of the United States relating to alien enemy property, and that the shares of these Voddors should be delivered by the executors to the alien property custodian.

The only question presented is whether or not the provision of the will by which Anna Kielsmark devised her property to these two nieces is void, on the sole ground that they were alien enemies of the United States at the time the bequest was made, and at the time the will was presented for probate.

Much learning has been expended on this question. It is a mere fiction of the law that all citizens of one country at war with another are each the enemy of the other. It is a fiction, however, indulged in to justify, in a measure, the rule that prohibits intercourse between citizens of countries at war with each other. The innocent suffer for the good of the whole people. It is a general principle, recognized and enforced by the courts of all civilized countries, that war operates as an interdiction on all commercial or other specific intercourse and communication with a public enemy. The courts of England and the courts of this country have spoken upon the question, and have recognized that, during war, all trade and intercourse between the citizens or subjects of one of the belligerent states or powers with those of the others are inimical to the best interests of each, except it be by license or permission of the government. So it follows that, without license, all commercial transactions, all trading between citizens of states or nations at war, are unlawful, and all contracts growing out of such trading, or out of voluntary intercourse with a public enemy, are void, and that no valid con-

tract can exist, nor any promise arise, by implication of law, from any transaction with an enemy, without permission from the government. See *Hill v. Baker*, 32 Iowa 302; *Rice v. Shook*, 27 Ark. 137 (11 Am. Rep. 783); *Bilgerry v. Branch & Sons*, 19 Gratt. (Va.) 393 (100 Am. Dec. 679); *Statham v. New York Life Ins. Co.*, 45 Miss. 581 (7 Am. Rep. 737); *Potts v. Bell*, 8 Term Rep. 549; also, authorities collated on page 686, L. R. A. 1917C; *United States v. Lapene*, 17 Wall. 601 (21 L. Ed. 693).

After the breaking out of war between Germany and the United States, Congress passed an act providing, among other things:

"That it shall be unlawful for any person in the United States, except with license of the president, granted to such person, * * * to trade, or attempt to trade, either directly or indirectly, with * * * any other person, with knowledge or reasonable cause to believe that such other person is an enemy, or ally of enemy." 40 St. at L. 412.

Further, that:

"No conveyance, transfer, delivery, payment, or loan of money or other property, in violation of [the foregoing provisions] made after the passage of this act, and not under license as herein provided shall confer or create any right or remedy in respect thereof." 40 St. at L. 417.

The act defined the words "to trade" as follows:

"(a) Pay, satisfy, compromise, or give security for the payment or satisfaction of any debt or obligation.

"(b) Draw, accept, pay, present for acceptance or payment, or indorse any negotiable instrument or chose in action.

"(c) Enter into, carry on, complete, or perform any contract, agreement, or obligation.

"(d) Buy or sell, loan or extend credit, trade in, deal

with, exchange, transmit, transfer, assign, or otherwise dispose of, or receive any form of property.

“(e) To have any form of business or commercial communication or intercourse with” an enemy. 40 St. at L. 412.

We do not find that it has ever been expressly held that the law of nations, as judicially declared, renders void a devise made to an alien enemy. We do not find it so held in direct terms, and we think there is reason for distinguishing the act of devising property to an alien from those transactions heretofore held void, especially when the devise relates to real estate. Nothing passes to the enemy at the time of the making of the will. The making of the will involves no personal transaction between the devisee and testator. Nothing passes at that time, nor can anything pass until the death of the testator. On the probate of the will, an executor is appointed, who serves as custodian of all the property, under the direction of the court. No action can be maintained by the alien to recover the property, or the increment of the property, while a state of war exists, and he acquires no dominion over it, either for use or service. A bequest by one relative to another, though the other be an alien enemy, does not even remotely suggest a purpose to give aid or comfort to the alien enemy, and does not, and in the nature of things cannot, tend to increase his resources. As said by Justice Gray, in *Kershaw v. Kelsey*, 100 Mass. 561, 573:

“At this age of the world, when all the tendencies of the law of nations are to exempt individuals and private contracts from injury or restraint in consequence of war between their governments, we are not disposed to declare such contracts unlawful as have not been heretofore adjudged to be inconsistent with a state of war.”

Justice Gray, in that case, further said, at page 572:

“The result is that the law of nations, as judicially de-

clared, prohibits all intercourse between citizens of two belligerents which is inconsistent with the state of war between their countries; and that this includes any act of voluntary submission to the enemy, or receiving his protection; as well as any act or contract which tends to increase his resources; and every kind of trading or commercial dealing or intercourse, whether by transmission of money or goods, or orders for the delivery of either, between the two countries, directly or indirectly, * * * or by contracts in any form looking to or involving such transmission. * * * Beyond the principle of these cases, the prohibition has not been carried by judicial decision."

What was said there by Justice Gray was quoted with approval by the Supreme Court of the United States in *Williams v. Paine*, in an opinion written by Justice Peckham, 169 U. S. 55 (42 L. Ed. 658).

It will be noted that the devisees Marie and Elizabeth Vodder were not represented in the trial of this case, except by the alien property custodian, and it will be noted that he is insisting, on the part of the government, that the devise be declared valid, and is asking that the property so devised be turned over to him for the use and benefit of the government. The custodian alone has appealed. Justice Fields, in dealing with an act of Congress not unlike the one here under consideration, in *Corbett v. Nutt*, 77 U. S. 464 (19 L. Ed. 976), said:

"If the devise of Mrs. Hunter can be brought within the language of the last section, it must be because a devise is embraced within the terms 'sales, transfers, and conveyances;' and because her 'aiding and abetting' the rebellion * * * are legitimate and necessary inferences from her voluntary and continued residence within the Confederate lines. * * * Assuming, however, that a devise is within the 'sales, transfers, and conveyances' invalidated by the act, and that Mrs. Hunter is within the

category of persons for whom the warning and proclamation of the president were intended, we are of the opinion that the invalidity declared is limited, and not absolute; that it is only as against the United States that the 'sales, transfers, and conveyances' of property liable to seizure are null and void; and that they are not void as between private persons, or against any other party than the United States. * * * It was to prevent these provisions from being evaded by the parties whose property was liable to seizure that 'sales, transfers, and conveyances' of the property were declared invalid. They were null and void, as against the belligerent or sovereign right of the United States to appropriate and use the property for the purposes designated, but in no other respect, and not as against any other party. Neither the object sought nor the language of the act requires any greater extension of the terms used. The United States were the only party who could institute the proceedings for condemnation; the offense for which such condemnation was decreed was against the United States; and the property condemned, or its proceeds, went to their sole use. They alone could, therefore, be affected by the sales."

This case is not directly in point on the question here under consideration; but, in a general way, it has a bearing upon the question here to be determined.

It will be borne in mind that Anna Kielsmark was a resident and a citizen of the United States; that she was the owner of the property, and acquired and held such ownership under the laws of the United States; that she had a right to convey and dispose of this property as she saw fit; that she had a right to bequeath it to aliens, and aliens had a right to take it under the bequest. The only question legitimately presented to the court was whether or not the instrument was the last will and testament of Anna Kielsmark, executed in conformity with the laws of

this state, and whether or not she had testamentary capacity, at the time, to make the will. The effect of the will, when executed, presented an entirely different question; but the parties, waiving the form in which the question was raised, have presented to us the sole question whether or not, when properly probated, the instrument is effectual as a devise of property within this state, and whether or not the interdiction of public law, based upon public policy, or the act of Congress, hereinbefore referred to, makes it void. We cannot construe the making of a will as within the inhibition of either the general law or the act of Congress. It certainly is not an act of trading, nor can it legitimately be brought within any of the definitions of trading, as made by the act itself. We must assume that the testator had a knowledge of the law; knew that any devise which she made would subject the property to confiscation by this government; knew that the devisees could not maintain any action to recover the property or the rent and profits accruing from the property during the continuance of the war; knew that the devisees could get no benefit from the property until after peace was declared. The time of her death was uncertain. The time when the will would become effectual was uncertain. Further, it was provided in the will itself,—and this negatives the thought that she was comforting the enemy:

“My executor shall hold the property and care for the same until they come, or until five years from the close of the present European War.”

She expressly provided that her executor, a resident and citizen of this country and this state, should hold the property until five years from the close of the war, unless the devisees became residents of this country, and residents of the place in which the property was situated. We think the fairer and better rule is that which was suggested and followed in *Weiditschka v. Supreme Tent of Knights of*

Maccabees, 188 Iowa 183. In that case, the answer raised the issue that the heirs of the insured person were residents and citizens of Germany, and therefore, as such, not entitled to take, and any bequest to them was void. In that case, it was said:

"The object is not to defeat the alien enemy of his right to recover whatever may be owed to him, nor to shield the citizen from the enforcement of his just obligations, but to obviate the deriving of any advantage by the enemy, directly or indirectly, pending hostilities. These reasons have persuaded many courts to postpone, rather than abate, actions begun before the countries were engaged in war."

Our conclusion is that, instead of declaring the devise invalid, the court should have declared it valid, and ordered the executor to retain the property until such time as peace was declared between this country and Germany. This construction of the law is in accord with that innate sense of fairness, decency, and justice which ought to exist between civilized countries, even in time of war, and to require courts, that believe in international rights, to be more careful to preserve them. To this end, the property of the German citizen may be preserved until such time as peace is declared, subject only to the rights of the government to take it, under any act providing for the forfeiture of alien property to the government. In *In re Boussmaker*, 13 Vesey 71, the court allowed the claim of an alien enemy to be proved in time of war, and the dividends held by the British court until peace. In the *Weiditschka* case, it was said:

"Indeed, the fact that our country is now at war with Germany is all the more reason why this court should most scrupulously award to this German citizen those international and equitable rights which no fair-minded people ever deny, even to their enemies in times of war."

Upon the whole record, we think the case should be re-

versed, and it is reversed, with order to enter decree in harmony with the conclusions herein expressed.—*Reversed and remanded.*

WEAVER, C. J., LADD and STEVENS, JJ., concur.

INTERSTATE INVESTMENT & DEVELOPMENT COMPANY, Appellee, v. CLEMENT L. WEBSTER, Appellant.

CORPORATIONS: Accounting Against Officer. An officer of a corporation who, after a sale of corporate stock *by the corporation*, substitutes, without authority, stock personally owned by him, and withdraws the amount thereof from the corporate treasury, will, in an action for accounting, be charged with the amount so withdrawn.

CORPORATIONS: Accounting—Burden of Proof. Claims, in an action for accounting, may not be allowed, on testimony which is so uncertain, indefinite, and unsatisfactory that not even approximate accuracy can be arrived at.

Appeal from Floyd District Court.—C. H. KELLEY, Judge.

MAY 15, 1920.

SUIT in equity for an accounting. The material facts will be referred to in the course of the opinion. There was a decree finding the defendant indebted to plaintiff in the sum of \$17,267.76, for which amount judgment was entered against him. The defendant appeals.—*Affirmed.*

Edwards, Longley, Ransier & Smith, J. C. Campbell, W. M. Brouillard, and H. J. Fitzgerald, for appellant.

Dawley & Jordan, W. G. Henke, and H. L. Lockwood, for appellee.

STEVENS, J.—The transactions out of which the controversy involved upon this appeal arose are numerous, and

of the respective parties, it should be noted that, so far as disclosed by the record, the only source of plaintiff's income was from the sale of stock. Many thousands of dollars were, however, realized from this source, the stock being sold at from 25 cents to \$25 per share, large commissions for selling being allowed the company's representatives.

It is conceded that the material used in the construction of the museum was furnished, or paid for, by defendant, and that the amount charged against the defendant, if properly chargeable to him, is not excessive. The building was erected on lots owned by defendant; but it is alleged, in an amendment to his answer and cross-petition, that it in fact belonged to plaintiff, for whom defendant held same in trust. The building was used as a place in which the gems and other products of the company were exhibited, but defendant has always claimed to be the owner thereof. A private account of defendant, offered in evidence, was found to contain many charges against plaintiff not insisted upon in his pleadings or at the trial. Among the several items appearing upon said account is a charge of \$5,000 for the rent of the museum. Title to the lots on which the building was situated at the time of the trial was in the name of defendant's wife, to whom he had conveyed the same. In the amendment to his answer referred to, he tendered a deed, conveying the property to plaintiff.

The attitude of defendant with reference to the management, control, and operation of plaintiff's business, and the claims made by him, render it extremely difficult to determine from the record what should be charged against or credited to him. His testimony was uncertain, indefinite, and unsatisfactory. We do not, however, feel that we can give a better reason for holding that the building belonged to plaintiff than that given by the trial court, in

1. CORPORATIONS:
accounting
against
officer.

its holding that same was the property of defendant. It is true that the products of the company were exhibited in the museum, but the collection was gathered by defendant, who claimed at least a considerable part thereof as his property. The item of \$1,000, charged to defendant on account of the Splinter stock transaction, is manifestly right. Stock of the company was sold to Splinter, and defendant substituted stock held by him therefor, and withdrew \$1,000 from the funds of plaintiff in payment thereof. This was wholly without authority.

The item of \$500 borrowed money presents another difficulty. That the money was borrowed upon the company's obligation is freely conceded, the defendant testifying that he deposited the same in one of the banks in which plaintiff's account was kept, and that same was expended for the benefit of the company; but he was unable to identify the item upon any of the books of the company or banks. The court below evidently reached the conclusion that this sum was retained by defendant. We are unable to find justification in the record for disturbing this holding. The item of \$145.97 for the fake survey represents a sum expended by defendant without authority, although he claims it was for the benefit of plaintiff, and expended with the knowledge of the board of directors. The survey was characterized by him as a "bluff," and, so far as disclosed, was not, and could not have been, of any benefit whatever to the corporation.

Passing, now, to the disputed items of defendant's counterclaim: The first one is the note of \$6,730.34, bearing date August 23, 1911, signed by the Interstate Investment & Development Company, Clement L.

2. CORPORATIONS: Webster, president, Wm. Blumenstiel, secretary, J. W. McLaughlin, second vice-president. The claimed consideration for this note was services which defendant performed for plaintiff,

at an agreed compensation of \$3 per day, under the original contract of employment. At the time this note was executed, defendant was president of plaintiff company. His bill for services was presented at a meeting of the board, presided over by himself, at which four other members were present. Krinklaw and Klinetop, members of the board, constituted the auditing committee appointed for the year; but, at the meeting in question, defendant appointed a temporary auditing committee to pass upon his bill, whereupon the two members above named left the meeting. According to the testimony of the two members of the temporary auditing committee, defendant threatened them with bankruptcy proceedings if they did not sign the note. The bill was allowed, but without more than a casual examination, defendant voting therefor; and the note was executed. Not long after defendant's employment as mining expert at \$3 per day, he became a member of the board of directors, took charge of, and thereafter appears to have dominated, plaintiff's affairs. It is impossible to determine from the evidence what services he rendered, or what amount, if any, was due him at the time the note was given. The court below found that he had collected and retained many thousands of dollars of plaintiff's funds, and ordered a cancellation of the note. We have already indicated the unsatisfactory character of defendant's testimony, and cannot therefrom make anything like a definite finding as to the amount, if anything, that should be allowed him on the note. The proof as to the item of \$6,880 for services as mining expert at \$3 per day is likewise too indefinite and uncertain to sustain a finding in defendant's favor. No one can tell for what services he should be paid under his contract, if he had a valid contract of employment. The action of the board of directors upon which defendant bases a right to recover this sum is as follows:

"Motion made, seconded, and carried that Clement L.

Webster be allowed \$4.00 per day, when actually engaged as scientific expert for the company.

"Conditions upon which Clement L. Webster accepts the position of scientific expert: 10 years period; that he should be issued 20,000 shares of the capital stock of said company, as part payment, and also to have additional compensation.

"It was further left to Clement L. Webster to designate, in his bill for labor performed, just what periods of time when said Webster does not claim compensation in his bills."

It will be observed that it was the duty of defendant to designate the period of time for which compensation under the above motion was not claimed by him. The bill presented covered the entire time, while the evidence showed that but a small portion thereof was devoted to rendering services as mining expert. It is impossible to determine from the record the number of days he worked. The defendant's testimony, as in other matters, was so indefinite and uncertain as to make even an approximation of the number of days for which he was entitled to compensation impossible. The same is true as to the item of \$1,927.28 for money loaned. While an itemized account was offered in evidence, defendant was able to throw but little light thereon, and the items of the account were made largely from memory. It is probable that he advanced and expended money in the management of plaintiff's business, but the burden was on him to show the amount. He is demanding and has received large compensation for other services rendered during this period, and we think the item was properly rejected by the court.

The remaining items need not be given separate consideration. The evidence in relation thereto is quite as unsatisfactory as that covering the items above mentioned. The business of plaintiff corporation has, so far, been profit-

able only to the extent of money received from the sale of stock. Defendant appears to have devoted much time and effort to promoting the enterprise. His reports to plaintiff as treasurer and expert are filled with exaggeration, and his claims as to the value of plaintiff's holdings apparently quite unreasonable. While he did not, upon the trial, or in any of the pleadings filed by him, seek to recover upon many items, amounting to thousands of dollars, charged in his private account against plaintiff, the fact that such charges were entered throws light upon the probable fairness and justness of the claims actually asserted. Among the items appearing in this account was one of \$2,500 for legal services rendered, although defendant was not a lawyer; \$5,000 rental for the use of the museum building; a charge for the use of the Ford automobile; and many other items. The explanation offered by defendant of these entries upon his private account was that his attorney had suggested that he make out a statement, charging plaintiff with all claims he could make against it. He abandoned the items referred to, upon the advice of other attorneys, who informed him that he could not recover thereon.

Defendant is not wholly to blame for the situation of plaintiff's affairs. The board of directors appears to have permitted him to dominate the business and direct the policy of the company. The interest of many stockholders is, however, naturally involved, and we reach the conclusion that the adjustment of the respective claims of the parties by the court below is as near right as could be reached upon the record, and it is, therefore,—*Affirmed*.

WEAVER, C. J., LADD and GAYNOR, JJ., concur.

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BROKERS. See GAMING.

Commission Payable in "Securities"—Failure to Consummate

- 1 **Contract.** A broker who, for effecting a sale for his principal, agrees to accept as commission a certain amount of "securities" which the principal is to receive from the other party to the sale, is not entitled to a money judgment against his principal for his commission, when such principal is in no wise to blame for the nonconsummation of the sale contract. In other words, the broker in such circumstances does not earn his commission until a sale is *actually effected*—until the "securities" are delivered to the principal. *Thompson v. Ryan*, 188—395.

Fraud as Defense Against Commission. A broker may be en-

- 2 titled to his commission from his principal, even though the contract of sale was never carried out by the parties; but not so when the principal has been led into the contract by his broker's fraud. Evidence held to demand the submission of such issue of fraud. *Thompson v. Ryan*, 188—395.

BROKERS Continued

TO

CARRIERS

Principal and Agent (?) or Partners (?) An agreement under
 3 which one party to a land deal furnished *all* the money and
 bore *all* the expense, and the other party was to have half
 the ultimate *profits*, does not constitute the profit-sharing
 beneficiary a *partner*. *McCarney v. Lightner*, 188—1271.

Profits as Commission—Termination of Contract. Where a
 4 broker was to have a commission, measured by half the
 profits realized on a retransfer of the land, and the land
 was transferred at a *loss*, held, on a detailed review of the
 evidence, that the parties understood that the agent's right
 to profits terminated at least as early as the first transfer,
 and was not kept alive as to later trades. *McCarney v.*
Lightner, 188—1271.

BURGLARY.

Possession in Lieu of Ownership—Evidence. "Use, possession,
 1 and control" of a railway car in a named company is not
 established by evidence that an employee of such company
 sealed it while it stood on a track, the ownership of which
 is not affirmatively shown. *State v. Dolson*, 188—629.

Purpose to Which Railway Car Is Put. The *purpose* for which
 2 merchandise is put and kept in a railway car must be
 shown, in order to meet the statutory elements of the of-
 fense. The naked *presence* of merchandise in a car at the
 time of a breaking and entering is insufficient to show that
 the car was one in which goods were kept for "use, sale, or
 deposit." *State v. Dolson*, 188—629.

Inferring Intent. Intent to commit larceny may not be inferred
 3 from the defendant's admission that he "tried" to enter a
 dwelling house. *State v. Cook*, 188—655.

CARRIERS. See PROCESS.

Res Ipsa Loquitur—Pleading and Proof. The particular acts of
 1 commission or omission which resulted in a collision of
 trains need not be alleged or proved by a passenger who was,
 himself, without fault. *Arnett v. Illinois Cent. R. Co.*, 188—
 540.

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CONTRACTS Continued

Mutuality—Interdependent Promises. An agreement that one

- 1 party will furnish the funds for a home, in return for annual interest on the funds advanced during the lifetime of the person so advancing, is enforceable after both parties have acted thereon. *Herron v. Brinton*, 188—60.

Consideration—Loss of Rights and Acquisition of Benefits. Loss

- 2 of rights by one party and the acquisition of benefits by another party afford ample consideration for a contract. So held as to a series of instruments pertaining to a gift to a religious institution. *Curtis & Barker v. Central Univ. of Iowa*, 188—300.

CONSTRUCTION AND OPERATION.

Express Not Excluding Implied. There may be an *implied*

- 3 contract on a point not covered by an express written contract. *Hawn v. Malone*, 188—439.

“Actual Cost.” An agreement by a mortgagor, out of possession,

- 4 to pay a mortgagee, in possession, the “*actual cost*” of permanent improvements made on the premises, simply means that mortgagor will pay the *actual amount of money expended* by mortgagee—does not embrace a promise to pay mortgagee for his own personal labor. *McGuire v. Halloran*. 188—479.

Certainty—“Equal Share.” Contract relative to the sale of,

- 5 land by parents to a son construed, and held that a clause, “after our day each one gets equal share,” referred to *all* grantor's children, and not to three children only. *Thomas v. Williams*, 188—961.

Consideration. An agreement by a vendee to pay an existing

- 6 mortgage on the land, “as part of the consideration,” very definitely points to the conclusion that payment of such mortgage works a payment *pro tanto* of the purchase price. *Thomas v. Williams*, 188—961.

Understanding of Parties. What the direct beneficiaries of an

- 7 ambiguous contract understood it to mean is persuasive on the issue of construction. *Thomas v. Williams*, 188—961.

CONTRACTS Continued

Agreement to Pay "Taxes" and Assessments. An agreement by

- 8 a tenant to pay "all taxes or assessments, special or otherwise, and public charges of every kind and nature that shall or may be taxed or assessed against the owner or his property," is not so all-embracing and sweeping as to include Federal *income* or excise taxes, levied under subsequently enacted statutes. *Des Moines Union R. Co. v. Chicago G. W. R. Co.*, 188—1019.

All-Embracing Words Limited by Context and Circumstances.

- 9 Words which are all-embracing and sweeping in their *possible* meaning may reveal a much lesser meaning when the *natural import* of such words is kept in mind, and when they are read in the light of the context and the attending facts and circumstances. So held where an agreement by a tenant to pay "taxes" and "assessments" was held not to include the payment of *income* or *excise* taxes, levied under laws passed subsequent to the agreement. *Des Moines Union R. Co. v. Chicago G. W. R. Co.*, 188—1019.

Practical Construction of Ambiguous Contract. The practical

- 10 construction placed by the parties on an ambiguous contract is persuasive on the issue of legal construction, and, in connection with the attending circumstances, may be quite controlling. So held on the question whether a writing was a *contract* of sale or a naked *option*. *Gompert v. Frost*, 188—1039.

RESCISSION AND ABANDONMENT.

Options—Non-Mutuality and Want of Consideration—Revocation.

- 11 A written, exclusive option to purchase or sell property, for which option the optionee pays nothing and expends nothing except time and money spent by him in an effort to effect a sale, and wherein optionee assumes *no* obligation, may, without the consent of the optionee, be revoked by the optionor at any time before acceptance. *Jester v. Gray*, 188—1249.

PERFORMANCE OR BREACH.

Agent as Purchaser. Where the owner of a farm knew that

- 12 his agent was one of the purchasers, and did not repudiate,

CONTRACTS Continued

TO

CORPORATIONS

but acquiesced in and consented to the transaction, and accepted the first payment of the purchase money, and after that, rights of other parties intervened, he cannot refuse to perform on the ground of his agent's participation. *Scott v. Habinck*, 188—155.

Donation to Religious Body—Violation of Conditions. Articles

13 of donation reviewed, and held not to permit the religious institution receiving the gift to violate, even in good faith, the terms of the gift. *Curtis & Barker v. Central Univ. of Iowa*, 188—300.

Failure to Fix Time. Principle recognized that, in the absence of a contract time for performance, the law will imply a reasonable time. *McCarney v. Lightner*, 188—1271.

ACTIONS FOR BREACH.**Parol to Show Conditional Delivery and Want of Consideration.**

15 Principle recognized that, as between the parties, parol evidence may be admissible to show (a) want of consideration and (b) *conditional* delivery. *Herron v. Brinton*, 188—60.

CONVERSION.

Equitable Conversion—Extent to Which Doctrine Carried. The doctrine of equitable conversion of realty into personalty will not be carried further than is *imperatively* necessary in order to carry out a testator's intent. In re *Estate of Sanford*, 188—833.

CORPORATIONS.**CAPITAL, STOCK, AND DIVIDENDS.****Unilateral Agreement to Repurchase Stock.** The unilateral

1 agreement of a corporation to repurchase, under named terms and conditions, stock which it has sold, does not ripen into an enforceable agreement in the hands of an assignee until the purchaser in some manner manifests an election to avail himself of such agreement. *Security Sav. Bank v. Workman*, 188—576.

CORPORATIONS Continued

Illegal Stock Subscription. A stock subscription, violative of a
2 statute, in that the purchase price was fixed at less than
par value, is non-enforcible. *Tramp v. Marquessen*, 188—
968.

Cancellation of Stock. A corporation which issues its stock to
3 one who is, in fact, an expert mineralogist, in consideration
that such expert will perform for the company expert serv-
ices in the science of mineralogy, may not, when such serv-
ices are actually rendered, thereafter have the stock can-
celed, on the ground that the recipient of the stock was
guilty, prior to the employment, of false representations
as to the manner in which he became such expert. *Devon-
ian Products Co. v. Webster*, 188—1368.

MEMBERS AND STOCKHOLDERS.

**Creditor's Action to Collect Unpaid Installments on Stock—Ma-
4 turity.** Actions by creditors of an insolvent corporation
against stockholders, to enforce a *primary* liability for un-
paid installments on the purchase price of stock, accrue on
the date *when the creditors' claim matures against the cor-
poration*, and not on the date *when the corporation's claim
matures against the stockholder*. *Shugart v. Maytag*, 188—
916.

**Unpaid Installments on Stock—Constitutional Law—Foreign
5 State.** Section 441 of the Civil Code of South Dakota, pro-
viding that stockholders are primarily liable to creditors on
unpaid installments of the purchase price of stock, is not
unconstitutional because violative of Sec. 8 of Art. 17 of the
Constitution of said state, which prohibits the issuance of
corporate stock "except for money, labor done or money or
property actually received." *Shugart v. Maytag*, 188—916.

Unpaid Stock—Innocent Purchaser. The primary liability of a
6 stockholder to creditors of the corporation for unpaid in-
stallments on the purchase price of stock, under Section
441 of the Civil Code of South Dakota, follows the stock
into the hands of a subsequent purchaser without knowl-
edge that payment had not been made. *Shugart v. Maytag*,
188—916.

CORPORATIONS Continued

Stock Issued for Unperformed Labor. The issuance of corporate
7 stock for labor which was never performed, is not binding
on a creditor of the corporation seeking to enforce a statutory liability for unpaid stock. *Shugart v. Maytag*, 188—916.

Liability of Transferor of Unpaid Stock. The transfer for a
8 nominal consideration of corporate stock, made after demand by a corporate creditor for the satisfaction of his claim, and not entered on the transfer books of the corporation, may not, under Section 423 of the Civil Code of South Dakota, be interposed against the creditor's action to collect of the transferor unpaid installments on the purchase price of the stock. *Shugart v. Maytag*, 188—916.

Unpaid Stock—"Stockholder" Defined. Just how one becomes
9 a stockholder of a corporation, provided the stock stands in his name on the books of the corporation, is quite immaterial, under Section 441 of the Civil Code of South Dakota. *Shugart v. Maytag*, 188—916.

OFFICERS AND AGENTS.

Sale of Unauthorized Stock—Personal Liability. The sale of corporate shares of stock which, without the knowledge of
10 the purchaser, have been issued for unappraised property other than money, is a fraud, and the corporate officers participating in such sale are personally liable for the return of the consideration paid, even though they derived no personal advantage from the sale. (Sec. 1641-b, Code Supp. 1913.) *Fish v. White*, 188—57.

Accounting Against Officer. An officer of a corporation who,
11 after a sale of corporate stock *by the corporation*, substitutes, without authority, stock personally owned by him, and withdraws the amount thereof from the corporate treasury, will, in an action for accounting, be charged with the amount so withdrawn. *Interstate Inv. & Dev. Co. v. Webster*, 188—1389.

CORPORATE POWERS AND LIABILITIES.

Legislative Control. The legislature has power to impose on a
12 corporation obligations additional to those imposed upon it

CORPORATIONS Continued

TO

CRIMINAL LAW

at the time of its incorporation. *Burlington R. & L. Co. v. City of Burlington*, 188—272.

Accounting—Burden of Proof. Claims, in an action for accounting, may not be allowed, on testimony which is so uncertain, indefinite, and unsatisfactory that not even approximate accuracy can be arrived at. *Interstate Inv. & Dev. Co. v. Webster*, 188—1389.

COSTS.

Protest Fees When Protest Waived. Protest fees may not be taxed, when the note contains a provision waiving protest. *Iowa Nat. Bank v. Davis*, 188—346.

COUNTIES.

Acts of Officers—County Attorney Ordering Transcript. A county is liable for the reasonable value of services rendered by a shorthand reporter, at the request of the county attorney and on the order of the court, in preparing a necessary transcript of shorthand notes formerly taken by the reporter as clerk of the grand jury. *Heller v. Montgomery County*, 188—981.

COURTS. See HABEAS CORPUS; INDICTMENT AND INFORMATION, 1.

Correction of Unsigned Record. It will be presumed that the correction of a court record was made before it was signed by the judge. (Sec. 243, Code, 1897.) *City of Keokuk v. Schultz*, 188—937.

CRIMINAL LAW.

LIMITATION OF PROSECUTIONS.

Reinstating Inadvertently Dismissed Information. Reinstating 1 an inadvertently dismissed information reinstates the standing which such information had prior to the dismissal, even though such reinstatement was made at a time when

CRIMINAL LAW Continued

more than a year had elapsed since the commission of the offense. *City of Keokuk v. Schultz*, 188—937.

EVIDENCE.

Confessions Involve All Elements of Crime. Admissions of the
2 truth of facts not in themselves sufficient to constitute the alleged offense, are not a *confession*. So held where the accused simply admitted, under a charge of attempted burglary, that he "tried" to enter the house, but made no admission, directly or indirectly, as to any felonious intent. *State v. Cook*, 188—655.

Confession—Insufficient Evidence of Corpus Delicti. A confes-
3 sion will not justify a conviction for attempted burglary, when the evidence of the *corpus delicti* shows an intent, but no *attempt*, to break and enter. *State v. Cook*, 188—655.

Verdict on Circumstantial Evidence. Circumstantial evidence in
4 support of a charge of assault with intent to murder reviewed, and held insufficient to meet the rule that such evidence must be consistent with guilt, and inconsistent with any rational theory of innocence. *State v. Brown*, 188—1303.

TRIAL—INSTRUCTIONS.

Alibi—Instructions. It is not error for the court to instruct
5 that defendant's evidence on the issue of alibi must outweigh the evidence introduced by the State to show that the defendant was engaged in the commission of said crime. *State v. O'Brien*, 188—165.

Alibi—Cautionary Instructions. Instructions to the effect that
6 an alibi is easily manufactured, and that the proofs pertaining thereto should be scanned with care and caution, are proper. *State v. Cartwright*, 188—579.

Accomplice—Insufficient Evidence. Evidence held insufficient to
7 show that the witness in question was an accomplice; and, therefore, no occasion arose for instructing in reference thereto. *State v. Cartwright*, 188—579.

CRIMINAL LAW Continued

TO

DAMAGES

Permitting Fact to Be Found at Nonmaterial Time. When the
8 existence of a fact has its real and only significance at a
certain and definite time or occasion, it is prejudicially er-
roneous to permit the jury to find the fact "on or about"
a named month. So held in a prosecution for murder, based
on an alleged miscarriage, where the fact of pregnancy had
no real significance, except on the occasion of a certain
visit to the defendant. *State v. Snyder*, 188—1150.

Verdict-urging Instructions. Instructions urging upon the jury
9 the desirability of a verdict are not objectionable when
nothing coercive appears from the language thereof, or
from the actions of the jury. *State v. Bogardus*, 188—1293.

TRIAL—CUSTODY, CONDUCT, AND DELIBERATIONS OF JURY.

Separation of Jury. A slight separation of jurors, concededly
10 without prejudice, cannot be denominated reversible error.
State v. Bogardus, 188—1293.

DAMAGES. See DRAINS, 1.

Nonfraudulent Failure of Consideration. The nonfraudulent
1 failure of consideration, following an exchange of proper-
ties, is compensated by returning to the injured party the
value of that which he paid for that which he did not re-
ceive, and, perhaps, expenses reasonably incurred. Es-
pecially is this the proper measure when the pleadings were
framed on such theory. *Sietsema v. Anderson*, 188—651.

Permanent Injury—Life Tables Not Essential. The introduction
2 of life tables is not essential to the recovery of damages
for permanent injury. *Willis v. Schertz*, 188—712.

Permanent Injury and Loss of Earning Capacity. An allegation
3 of permanent injury, with claim for damages, is sufficient
basis, if proven, to warrant recovery for depreciation in
earning capacity. *Willis v. Schertz*, 188—712.

Permanent Injuries and Mental and Physical Pain. Recovery
4 may be had for mental and physical pain, under allegations
of severe, permanent injury. *Willis v. Schertz*, 188—712.

DEAD BODIES

TO

DEPOSITIONS

DEAD BODIES.

Undertaker Permitting Wrongful Autopsy—Joint Liability. If an
1 undertaker knowingly permits a wrongful autopsy to be held in his undertaking establishment, he participates in the wrong, and is jointly liable therefor. *Konecny v. Hohenschuh*, 188—1075.

Undertaker Permitting Wrongful Autopsy—Reliance upon Hospi-
2 **tal Physicians.** An undertaker, receiving a dead body from a hospital and allowing an autopsy in his establishment by the hospital physicians, who had not secured consent therefor from the decedent's relatives, had the right to assume that said medical staff would not perform an unauthorized autopsy, and he was charged with no duty to ascertain whether proper consent had been obtained for the autopsy. *Konecny v. Hohenschuh*, 188—1075.

DEDICATION. See **HIGHWAYS**, 1.

Use of Land for Road—Presumption. No presumption or inference of dedication arises from the naked use of land for a roadway, howsoever long continued. One may not be held to have dedicated his land to public or private use, short of evidence which establishes a positive and unmistakable intention to permanently abandon his property to public or private use. *Young v. Ducil*, 188—410.

DEEDS. See **HOMESTEAD**, 1.

Delivery—Retention by Grantor—Effect. Delivery will be presumed from the execution and acknowledgment of a deed, together with testimony tending to show intention to pass title, *even though grantor retains full possession of the deed until his death*. *McKemey v. Ketchum*, 188—1081.

DEPOSITIONS.

Oral Taking Outside State Not Permissible. Depositions may not, in the absence of an agreement, be orally taken outside the state. *Bohen v. North American L. Ins. Co.*, 188—1349.

DIVORCE

DIVORCE.

GROUND.

Cruelty—Coarseness of Language and Conduct. Profane and
 1 abusive language towards a frail woman, untrue and repul-
 sive accusations concerning her conduct, neglect of her com-
 mon comfort, with consequent injury to her health, may con-
 stitute cruel and inhuman conduct. *Hickman v. Hickman*,
 188—697.

DEFENSES.

Condonation. Condonation of cruelty is necessarily attended
 2 with the condition that the cruelty shall cease; and es-
 pecially is this true when the wife is the condoning party.
Hickman v. Hickman, 188—697.

JURISDICTION.

Residence—Sufficiency. Residence is not wholly a matter of ex-
 3 pressed intention. Acts and conduct must harmonize with
 intention. Evidence held sufficient to justify the court in
 setting aside a decree, on the grounds of want of residence
 and good faith. *Messenger v. Messenger*, 188—367.

ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY.

Allowance Pending Suit—Excessiveness. Order for attorney
 4 fees and expense money reviewed, and held excessive. *Mit-
 chell v. Mitchell*, 188—490.

Setting Aside Exempt Property. Alimony may consist of
 5 specific property, whether exempt or not. *Szymanski v.
 Szymanski*, 188—931.

Vesting Title in Daughter. No statutory authority exists for
 6 assigning alimony, and requiring the title to be vested in a
 daughter. Allowance reviewed, and modified as excessive.
Szymanski v. Szymanski, 188—931.

DIVORCE Continued

TO

DRAINS

Unenforcible Decree—Modification. Decrees for alimony, proper
7 in amount, but unenforcible by reason of the terms and
lienability of unpaid payment, will be so modified on appeal
as to render the decree effective. *Jasper v. Jasper*, 188—
1247.

CUSTODY AND SUPPORT OF CHILDREN.

Custodial Orders—Modification under Changed Conditions. A cus-
8 todial order apportioning the custody of a child between
the father and mother may, on a showing that, subsequent
to the order, the father has deprived himself of any means
of properly caring for the child, be so modified as to assign
the custody of the child wholly to the mother. *Ladd v.*
Ladd, 188—351.

Custodial Orders—Appealability. Appeal lies from a refusal to
9 modify custodial orders *in re* children, even though no ap-
peal has been taken from the divorce decree. *Ladd v.*
Ladd, 188—351.

Modification of Alimony Provisions Because of Remarriage.
10 Alimony decrees for the benefit of minor children will not
be modified on the sole ground that the plaintiff mother has
remarried, especially when there is no showing of change in
the financial condition of the parties. *Dull v. Dull*, 188—
941.

DRAINS.

Purchase of State Lake Bed under Order for Drainage—Damages.

- 1 One who purchases of the state the bed of a meandered lake,
with necessarily imputed knowledge that the sale was be-
ing made under a legally authorized finding, by the exec-
utive council, that the lake was detrimental to the public
health and welfare, and *should be drained*, may not, upon
the establishment of a drainage improvement, claim dam-
ages for the drainage of the lake, based solely on the claim
that he was an abutting landowner. *Higgins v. Board of*
Supervisors, 188—448.

“Repairs”—Additional Tile Not New Drain—Classification of
2 **Benefits.** The construction of an additional tile of equal

DRAINS Continued

size, for the purpose of assisting in carrying off water, parallel with an existing tile which is a part of the drainage system, and as an outlet for several laterals emptying into an open ditch, which was inadequate to carry off the water, was not a new drain, but a "repair," under Sec. 1989-a21, Code Supp., 1913, and could be constructed without the appointment, under Sec. 1989-a12, Code Suppl. Supp., 1915, of commissioners to classify lands for assessment of benefits. *Mathwig v. Drainage Dist.*, 188—267.

New Improvement (?) or Repair (?) The fact that the cost
3 of an improvement on an existing drain is almost double the cost of the original construction is very persuasive that such improvement should not be classed as a *repair*. *Bloomquist v. Board of Supervisors*, 188—994.

Assessments—Deference to Action of Board. The rule of defer-
4 ence to the action of the board of supervisors in adjusting assessments *presupposes* that the board has, with reasonably painstaking care, availed itself of all available and material information bearing on an approximately just distribution of burdens. The rule ceases when its presupposed basis is shown not to exist. Record reviewed, and held to show that the assessments fixed by the court were more accurate than those fixed by the board. *Board of Supervisors v. McDonald*, 188—6.

Assessments—Approximate Accuracy. Principle recognized that
5 an approximately correct assessment is the best that the court may hope to arrive at in threading its way through the ordinary maze of conflicting estimates bearing on the relative amount of swamp, wet, and dry land in the various tracts. *Board of Supervisors v. McDonald*, 188—6.

Appeal—Decree Irrevocably Fixing Classification. The district
6 court, on appeal from assessments, may not decree that the classification found by it to be correct shall be the basis "*for future assessments by way of improvements.*" (See Sec. 1989-a12, Code Supp., 1913.) *Board of Supervisors v. McDonald*, 188—6.

Nonallowable Amendment on Appeal. Objections before the
7 board of supervisors that an assessment is illegal and inequitable, because of (1) nonbenefits, (2) nonproportionate

DRAINS Continued

benefits, and (3) inability to tile into the drain, may not be enlarged on appeal by a so-called amendment asserting that the commissioners to assess benefits wholly failed to qualify or act as such commissioners. *Bloomquist v. Board of Supervisors*, 188—994.

Waiver by Landowner of Illegal Procedure by the Board. Irregularity and illegality of procedure by the board in exercising its conceded jurisdiction over a drainage proceeding may be waived by an objecting landowner. So held where it was assumed that the board had resolved that an assessment for improving an existing ditch should be made in the proportions adopted for the original construction, and thereafter appointed the commissioners of benefits, who computed the assessment in accordance with the resolution, and returned it to the board, and the landowner did not object thereto, except on appeal from the action of the board in confirming the assessment. *Bloomquist v. Board of Supervisors*, 188—994.

Theory of Hearing before Board Followed on Appeal. The theory of a hearing before the board, that the amounts of assessments were subject to change on meritorious showing, will be followed on appeal, even though the board, in view of its former action, might have taken the position that such assessments were a mere matter of mathematical computation, and subject to no change except for error in so computing. *Bloomquist v. Board of Supervisors*, 188—994.

Implied Annulment of Proceeding. A resolution by the board, ordering an assessment for improving an existing drain to be computed in the proportions which governed in the original construction, is impliedly annulled by the action of the board in treating the assessment, on objection by a landowner, as subject to change on a showing of inequitableness. *Bloomquist v. Board of Supervisors*, 188—994.

Inequitable Assessments Between Upper and Lower Owners. Record held to demonstrate that the assessment of lands near the outlet of a drain, where but little of the cost accrued, was inequitable, when compared with assessments of lands at the far-removed source of the drain, where a very large proportion of the cost did accrue. *Bloomquist v. Board of Supervisors*, 188—994.

EASEMENTS

TO

ESTOPPEL

EASEMENTS.

Naked Use. *Naked use* of land as a road, with consent of the owner, howsoever long continued, will not ripen into an easement. *Young v. Duell*, 188—410.

ELECTION OF REMEDIES. See **SALES**, 3.

Special Lien Abandoned by Execution Levy. Special claims, or rights in and to personal property by virtue of a mortgage or conditional sale, are wholly waived by obtaining personal judgment against the debtor *and seizing the property under execution levy*. *Newcomer v. Novak*, 188—646.

ELECTIONS.

Erasure of Ballot Mark. A ballot will be treated as blank when the voting mark is almost completely erased. *State v. Consolidated Ind. Sch. Dist.*, 188—959.

ELECTRICITY. See **NEGLIGENCE**, 6.**EMINENT DOMAIN.** See **CONSTITUTIONAL LAW**, 3.

Acts Not Constituting a "Taking." Principle recognized that an act done in the proper exercise of governmental powers, and not directly encroaching upon private property, though impairing its use, is not a "taking" of property in a constitutional sense. *Higgins v. Board of Supervisors*, 188—448.

ESTOPPEL. See **EXECUTORS AND ADMINISTRATORS**, 2; **INSURANCE**, 7.

Failure to Show Prejudice. Pleading estoppel and proving all 1 elements thereof except *prejudice* avails nothing. So held where plaintiff pleaded that, owing to reliance on a guaranty, he had failed to institute bankruptcy proceedings against the principal debtor, but failed to prove that he would have realized anything, had he instituted such proceedings. *City Bank v. Alcorn*, 188—592.

ESTOPPEL Continued

TO

EVIDENCE

Profiting from One's Own Wrong. One who prevents the happening of an event which would fix liability upon him may not, when sued, allege the non-happening of such event. So held where a note was payable on the happening of a contingency, and the maker prevented the happening of the same. *Dille v. Longwell*, 188—606.

Plea Based on Violation of Law—Corporate Stock. He who subscribes for and receives corporate shares of stock, without complying with a law which commands him to make payment therefor, may not, when sued by a corporate creditor for unpaid installments, plead that his failure to make payment for the stock rendered void the issuance of the stock. *Shugart v. Maytag*, 188—916.

EVIDENCE.

RELEVANCY, MATERIALITY, AND COMPETENCY.

Unidentified Letter. Testimony which is without probative force, and which can serve no purpose other than to enable the jury to make a bold guess at the existence of a material and issuable fact, is wholly incompetent. *Jones v. Spencer*, 188—94.

Relevancy. Evidence tending to show that pregnancy or change of life would render a person noninsurable is quite aside the mark, when the sole issue was whether insured knowingly deceived the insurer, by stating that she did not have an ovarian tumor. *Bohen v. North American L. Ins. Co.*, 188—1349.

Res Gestae—Test for Admission. The test whether declarations are *res gestae* is: Were the facts talking through the party, or the party talking about the facts? Instinctiveness—spontaneity—is the ever-present requisite. Precise coincidence in point of time is not necessarily requisite. *Stukas v. Warfield-Pratt-Howell Co.*, 188—878.

Materiality. Evidence of what the officers of an insurance company "would have done" with reference to a policy, had they known certain facts touching incumbrances, is wholly immaterial, under an issue whether a condition of the

EVIDENCE Continued

policy had been broken. *Collins v. Iowa Mfrs. Ins. Co.*, 188—289.

ADMISSIONS.

Offers to Confess Judgment. Rejected offers to confess judgment are not admissible in an action on the claim. *Bohen v. North American L. Ins. Co.*, 188—1349.

DOCUMENTARY EVIDENCE.

Book of Original Entries. A so-called loose-leaf ledger, showing, by timely entries, the various items of labor or materials and the separate charges therefor, and *intended*, at the time of making up, to constitute the permanent evidence of the charges, is admissible as a book of original entries, even though made up from memorandum slips, which showed the various items of labor or materials, without charges attached thereto, and which were *intended* as temporary aids in making up the ledger, and not as permanent evidence of charges. *Shea v. Biddle Impr. Co.*, 188—952.

Book of Original Entries—Timely Entries. Evidence reviewed, and held to show that entries in books of original entry were timely. *Shea v. Biddle Impr. Co.*, 188—952.

PAROL AS AFFECTING WRITINGS.

Conditional Delivery. Parol evidence is admissible between the original parties to an unconditional negotiable promissory note, to show that the delivery was on the agreement that the payment of the annual interest during the lifetime of the payee should work a full discharge of the note. (Sec. 3060-a16, Code Supp., 1913.) *Herron v. Brinton*, 188—60.

Want or Failure of Consideration—Conditional Delivery. Parol evidence is admissible between the holder of a promissory note and an endorser (the original parties) to show that the endorsement was made: (1) Without consideration—without the assumption of any liability on the part of the endorser; (2) on a consideration that had failed; (3) on the condition that the holder would see that the note was

EVIDENCE Continued

paid from other property of the maker then in the hands of the holder. (Sec. 3060-a16, Code Supp., 1913.) *State Sav. Bank v. Osborn*, 188—168.

Avoidance of Forfeiture. Parol evidence is admissible, on the issue of the forfeiture of a lease, to show what matters were, by mutual mistake, omitted from the written lease. *Faringer v. Van de Hoef*, 188—323.

True Consideration Paid. Parol evidence is admissible to show the true consideration paid by a vendee for incumbered land,—to show that the amount of existing incumbrances was deducted from the purchase price,—and thereby to indicate an implied promise by vendee to pay such incumbrances. *Hawn v. Malone*, 188—439.

Identifying Subject-Matter of Trust Deed. Parol evidence is admissible to identify the debts for the payment of which a trust deed has been given. *King v. Cole*, 188—562.

Damages for Fraud. The rule against varying or contradicting a writing by parol has no application under an issue of damages for fraud in obtaining the writing. *Qualley v. Citizens Sav. Bank*, 188—1212.

OPINION EVIDENCE.

Sanity. Nonexpert witnesses may testify to the sanity of a person on no other showing than that they had never, during long acquaintance with the person, observed anything strange, unusual, or unnatural about him. *Kerkhoff v. Monkemeier*, 188—103.

Death from Lightning. One familiar with the condition and appearance of the hide of an animal killed by lightning may testify, on stated facts, whether the animal was so killed. *Lyons v. Farm P. M. Ins. Assn.*, 188—506.

Allowable Conclusion. Whether one received anything for a conveyance is an allowable conclusion. *Tamingo v. Frelberg*, 188—788.

Inability to Maintain Action. A statement by one who was negotiating for a release of damages "that he was a lawyer

EVIDENCE Continued TO EXECUTORS AND ADMINISTRATORS

of experience, and that the injured party would not be able to maintain an action for his damages," made for the purpose of being acted upon by the injured party, is, in legal effect, a statement of fact. *Owens v. Norwood-White Coal Co.*, 188—1092.

Fraudulent Purpose. An opinion given for the deliberate purpose of deceiving another may be treated as a statement of fact. *Owens v. Norwood-White Coal Co.*, 188—1092.

EXECUTION. See ELECTION OF REMEDIES.

EXECUTORS AND ADMINISTRATORS. See APPEAL AND ERROR, 20.

Conflicting Appointments in Different Counties. An appointment
1 of an administrator by the clerk or court of one county, based on a finding that the deceased was a resident of said county at the time of his death, is a *finality*, until set aside on appeal or *direct attack*, and *exhausts the power throughout the state in any other clerk or court to make another appointment* until the former order is so set aside. In re Estate of Kladiwo, 188—471.

Estoppel to Question Illegal Appointment. The act of a validly
2 appointed administrator in negotiating with an invalidly appointed administrator for the settlement of claims filed with the latter does not work an estoppel to dispute the validity of the appointment of the latter. In re Estate of Kladiwo, 188—471.

Notice of Appointment—Failure to Secure Direction of Clerk or
3 **Court.** Notice of the appointment of administrators must be ordered or directed by the *court or clerk*, in order to start the running of the statute of limitation on claims. In re Estate of Camp, 188—734.

Claims—Belated Presentation. The fact that a claim was not
4 ascertainable until long after the expiration of 12 months from the publication of the administrator's notice of appointment, coupled with the fact that the estate is solvent, presents such equitable circumstances as will let in a claim

EXECUTORS AND ADMINISTRATORS Continued TO

FIXTURES

after all other claims are barred. In re Estate of Camp, 188—734.

Claims for Family Services—Overcoming Presumption. The presumption that services rendered by a daughter to her father, in caring for him in her family, are gratuitous, is not overcome by evidence that the daughter was in indigent circumstances, while the father had financial means for his keep, even though the father was incapable of performing any reciprocal service; but a jury may find the contrary of such presumption by *additional* evidence (1) that other sons and daughters in the neighborhood were financially able to care for their father; (2) that the daughter asserted to her father and to his guardian her expectation to charge for her services, and that neither objected thereto; and (3) that the daughter then continued her services. Snyder v. Nixon, 188—779.

Ancillary Administration Turning Over Funds. It will be presumed that the courts of a sister state will promptly order its ancillary administrator to turn over funds to the principal administrator in this state when such action is necessary to pay debts. In re Estate of Sanford, 188—833.

EXEMPTIONS.

Team—Mortgage Without Concurrence of Wife. A team habitually used by a farmer to earn his living is exempt, and a mortgage thereon without the concurrence and signature of the wife is absolutely void, even though the farmer has other teams with which he does not earn his living. Augustine v. Gold, 188—551.

FIXTURES.

Mortgagor and Mortgagee—"Permanent Improvements." An agreement to pay a real estate mortgagee, in possession, for "permanent improvements," does not embrace a grinding mill, nor a windmill tank, nor an interest in a rural telephone company, in the absence of evidence showing that such articles are a part of the land; neither does such agreement embrace an undivided interest in an ensilage cutter. McGuire v. Halloran, 188—479.

FORCIBLE ENTRY AND DETAINER TO FRAUDS, STATUTE OF
FORCIBLE ENTRY AND DETAINER.

Enforcement of Order Against Stranger. A judgment of removal in forcible entry and detainer proceedings may not be enforced against one who, at the time of the commencement of the proceeding, and at the time of the attempted enforcement of the judgment, was in actual possession of the property, and had never been made a party to the proceedings. *Cedar Rapids Cold Storage Co. v. Lesinger*, 188—1364.

FRANCHISES.

Strict Construction. A franchise to construct a street railway and necessary side tracks, turnouts, and switches "*on South Dodge Street from Grandview Avenue*" will not authorize *any* construction on Grandview Avenue, and especially will not authorize the construction of a "loop." *City of Dubuque v. Dubuque Elec. Co.*, 188—1192.

FRAUD. See SPECIFIC PERFORMANCE, 3-5.

Evidence. An allegation of material and false representations
 1 of fact necessarily requires the production of proof thereof. Offered testimony reviewed, and held improperly excluded. *Qualley v. Citizens Sav. Bank*, 188—1212.

Affirming Contract and Recovering Damages. The victim of a
 2 fraud-induced contract may affirm, and recover the resulting damages. *Qualley v. Citizens Sav. Bank*, 188—1212.

Examination Excluding Reliance on Representations. An exam-
 3 ination of property prior to purchase does not necessarily exclude reliance or right to rely on representations relative to the property. Such issue is ordinarily for the jury. So held as to representations as to the tillability and nonoverflow nature of the land. *Harris v. Polk County Inv. Co.*, 188—1259.

FRAUDS, STATUTE OF.

Promise Made on Marriage Consideration. An agreement that
 1 a property settlement would be made upon a seduced wo-

FRAUDS, STATUTE OF Continued

TO

GAMING

man if she would dismiss her civil action against the seducer and marry him, and thereby abate criminal proceedings, is not a promise made in consideration of marriage. *Bader v. Hiscox*, 188—986.

Promise on Consideration of Marriage—Performance. *Arguendo*,

- 2 it is conceded that the actual entering into the marriage relation does not constitute performance or part performance of a promise made in consideration of marriage. *Bader v. Hiscox*, 188—986.

Denying Statute to Prevent Fraud. It is suggested that he who

- 3 makes a *promise in consideration of marriage* may not take cover under the statute of frauds, and thereby avoid performance, *when he has inveigled the woman into an actual marriage* on the pretense that the promise would be performed. *Bader v. Hiscox*, 188—986.

Debt or Default of Another. An agreement with a seduced wo-

- 4 man, made by the father of the seducer, that *he* (the father) would make a settlement on the woman if she would dismiss civil and criminal proceedings against the son, is not a promise to answer for the debt or default of *another*. *Bader v. Hiscox*, 188—986.

Paying Purchase Price and Taking Possession. An agreement

- 5 under which one pays the purchase price of land and takes possession is not within the statute of frauds. *Tamingo v. Freiberg*, 188—788.

GAMING.

Bucket Shops—Nondelivery of Grain—Pleading. A defendant in

- 1 an alleged "bucket shop" deal who pleads (*apparently* under Sec. 4967, Code, 1897), that *neither he nor the broker* ever intended any actual delivery of the grain, does not es-
top himself from invoking the aid of Sec. 4975-d, Code Supp., 1913, which invalidates such contracts *if the broker alone* intended nondelivery. *Harper & Ward v. Kurtz*, 188—1047

Bucket Shops—Statutes Compared. Section 4967, Code, 1897.

- 2 furnishes no remedy against a fraudulent broker who does

GAMING Continued

TO

GUARDIAN AND WARD

not intend delivery of the thing sold, *if the buyer did intend such delivery*. Sec. 4975-d, Code Supp., 1913, does furnish such relief. Harper & Ward v. Kurtz, 188—1047.

Bucket Shops—Nondelivery—Evidence. On the issue of nonintended delivery of grain, evidence is admissible that, from time to time during a period of three years, defendant, without payment of the purchase price, had “bought” of plaintiff over 700,000 bushels of grain, and no part of the same had ever been delivered, through warehouse receipts or otherwise. Harper & Ward v. Kurtz, 188—1047.

GIFTS.

Rescission for Breach of Condition. Whether, under the particular terms of a gift to a religious institution, the gift would revert to the donors because of the failure to exact a bond of the financial officer of the institution, as required by the terms of the gift, *quaere*. Curtis & Barker v. Central Univ. of Iowa, 188—300.

GRAND JURY.

Refusal to Answer Nonmaterial Question. A witness may not be lawfully committed to jail for refusal to answer questions before a grand jury, when the materiality and relevancy of such questions to an indictable offense then under investigation do not appear, either (1) from the face of the questions or (2) from an independent showing of facts. Hobson v. District Court, 188—1062.

GUARANTY. See SALES.

GUARDIAN AND WARD. See ADOPTION.

Necessaries for Ward—Consent to Furnishing. A guardian of the property and person may, without an order of court, so consent to the furnishing of *necessaries* to his ward as to bind the ward's estate for the reasonable value thereof. So held where the guardian knew that his ward was being cared for by the ward's daughter. Snyder v. Nixon, 188—779.

HIGHWAYS Continued

TO

HOMESTEAD

Law of Road—Applicability. The "law of the road"—the law

- 11 which requires persons in vehicles meeting on the public road to turn to the right—is applicable to the driver of a horse-drawn vehicle who meets coasters on the public road. (Sec. 1569, Code Supp., 1913.) *Roennau v. Whitson*, 188—138.

Nuisance Resulting from Reckless Use. Principle recognized

- 12 that the use of *any* vehicle upon a public highway may be of such nature as to constitute a nuisance. *Roennau v. Whitson*, 188—138.

Excessive Speed by Automobile. Negligence may be presumed

- 13 from the operation of a motor vehicle at a speed exceeding 25 miles per hour. (Sec. 1571-m19, Code Supp., 1913.) *Wagner v. Kloster*, 188—174.

Law of Road—Crossing Intersections. Principle recognized that

- 14 travelers passing each other at right angles at intersections are not controlled by the statute which requires them to turn to the right when *meeting*. (Sec. 1569, Code Supp., 1913.) *Wagner v. Kloster*, 188—174.

Duty of Guest to Exercise Care. While a mere guest must ex-

- 15 ercise care commensurate with the circumstances, and *might*, in the interest of safety, be under a duty to make suggestions to the driver, or otherwise interfere with the management of the vehicle, yet such guest is not, *per se*, bound to anticipate a violation of law, either on the part of another driver in keeping to the wrong side of the road, or on the part of her own driver in not sounding his horn. (Sec. 1571-m18, Code Supp., 1913.) *Willis v. Schertz*, 188—712.

HOMESTEAD.**Trust Deed—Construction.** Trust deed to a homestead by heirs

- 1 of the deceased parents, conditioned "to pay the debts" of the parents, construed, in the light of explanatory evidence, and held to embrace only the debts attending the funeral expenses consequent on the death of the parents. *King v. Cole*, 188—562.

HOMESTEAD Continued

TO

INDICTMENT AND INFORMATION

In Lieu of Distributive Share—Election. Evidence of acts, conduct, and declarations attending long-continued possession of a homestead, following the death of the owner, reviewed, and held to establish an election to take homestead occupancy, in lieu of distributive share. *Geraty v. Barber*, 188—690.

Retirement Pay of a Soldier Not a Pension. A homestead is not rendered exempt because purchased with money paid by the Federal government to an ex-soldier after his retirement from the army, as a continuance of his pay while in the service. *Szymanski v. Szymanski*, 188—931.

HUSBAND AND WIFE. See SPECIFIC PERFORMANCE, 3.

Claims Arising Out of Wife's Separate Business—Care of Parent. Services rendered by a wife in the care of her father, under an express or implied agreement that *she* will be compensated therefor, are recoverable by the wife, without any assignment by the husband to the wife. *Snyder v. Nixon*, 188—779.

INDICTMENT AND INFORMATION.

Reinstating Cause after Inadvertent Dismissal. Courts have power to reinstate a criminal proceeding inadvertently dismissed. *City of Keokuk v. Schultz*, 188—937.

Notice of Application to Reinstate Dismissed Action. One who has notice of the time and place of hearing of an application to reinstate an inadvertently dismissed information must inform himself, at said time and place, of the *future* time and place when the court can and will grant a hearing. *City of Keokuk v. Schultz*, 188—937.

Sufficiency of Notice to Reinstate Dismissed Action. One may not say he had no notice of the reinstatement of a dismissed information, when he moved to set aside the *reinstatement*, and had a full hearing on the merits. *City of Keokuk v. Schultz*, 188—937.

Needless Allegations—Abortion. An allegation in an indictment for murder, based on an attempted miscarriage, that the

INDICTMENT AND INFORMATION Continued TO INJUNCTION
female was pregnant, in no wise affects her identity, and calls for no proof. *State v. Snyder*, 188—1150.

Amendment. An indefinite allegation of the ownership of property may be made definite by amendment. *State v. Borgardus*, 188—1293.

INFANTS. See ADOPTION; DIVORCE, 8-10; JUDGMENT, 2; MASTER AND SERVANT, 13; PARENT AND CHILD.

INJUNCTION. See HIGHWAYS, 8; WATERS AND WATER-COURSES, 1.

Bond—Dismissal of Suit. In an action to vacate a judgment charged to have been wrongfully obtained, where the injunctive relief asked is merely auxiliary and incidental, the dismissal of the suit is not, in an action on the injunction bond, an adjudication that the injunction should not have been granted, although it would have been such an adjudication, had the suit been solely for injunctive relief. *Western Fruit & Candy Co. v. McFarland*, 188—204.

Bond—Liability for Costs. It is only under bonds executed under the general injunction statute, Secs. 4354 to 4376, inclusive, Code, 1897, that recovery for expenses in dissolving the injunction has no limit save what is reasonably expended for that purpose; and in a proceeding under Secs. 4097 to 4099, inclusive, Code, 1897, the liability is restricted to the payment of any penalty assessed, and there is no liability on the part of defendants for expenses in dissolving the injunction. *Western Fruit & Candy Co. v. McFarland*, 188—204.

Bond—Premature Suit. Where an injunction bond was given in a suit to vacate a judgment wherein auxiliary injunctive relief was sought, and the said action was dismissed, and the main suit and an application therein for an injunction were pending at the time suit was brought on the bond given in the auxiliary proceedings, the suit on that bond was prematurely brought; as, until the main case was decided, it could not be adjudged that the injunction was wrongful in its inception. *Western Fruit & Candy Co. v. McFarland*, 188—204.

INSURANCE Continued

Deducting Amount Due on Mortgagee's Policy. On the issue

5 whether the amount of insurance collected by a mortgagee under his policy should be deducted from the amount due on the policy held by the owner of the property, record reviewed, and held to accord to the insurer ample protection to his rights. *Collins v. Iowa Mfrs. Ins. Co.*, 188—289.

AVOIDANCE OR FORFEITURE OF POLICY.

Increased Hazard—Fire in Concrete Silo. The building of a fire

6 in the center of a silo on a concrete floor did not invalidate a policy of fire insurance having a provision making the policy void "if the hazard be increased by any means within the knowledge of the insured," such provision not having reference to mere temporary acts of negligence, or ordinary acts of ownership. *Nash v. American Ins. Co.*, 188—127.

ESTOPPEL, WAIVER, OR AGREEMENTS.

Waiver and Estoppel Based on Criminal Act. Waiver and es-

7 toppel result from the act of an insurer in issuing a policy and accepting the premium, with knowledge that the insured was then carrying other insurance in companies *not authorized to do business in this state*, and later attaching a rider to the policy authorizing such insurance, even though the attaching of such rider was a criminal violation of the Standard Policy Act. (Sec. 1758-b, Code Supp., 1913.) *Cooper W. & B. Co. v. National B. F. Ins. Co.*, 188—425.

ACTIONS ON POLICIES.

Fire Insurance—Cause of Injury. Evidence reviewed, in an ac-

8 tion on a fire insurance policy for damages to a silo, and held sufficient to go to the jury on the issue as to whether the injury to the silo was caused by fire, and not by the generation or explosion of gas vapor. *Nash v. American Ins. Co.*, 188—127.

Defenses—Reckless Negligence. While mere faults or negli-

9 gence of the insured, unaffected by any fraud or design, do not constitute a defense to an action on a fire insurance policy, yet this rule will not excuse extreme recklessness

INSURANCE Continued

and inexcusable negligence on his part, the consequences of which must have been obvious to him at the time. *Nash v. American Ins. Co.*, 188—127.

Fire Insurance—Reckless Negligence of Insured. Evidence re-
10 viewed, in an action upon a fire insurance policy for damages to a silo, and held sufficient to go to the jury on the question whether the insured, in building a fire within the silo in the center of the concrete floor, was guilty of such gross recklessness or negligence as that the jury could have found that he acted by design in burning the silo. *Nash v. American Ins. Co.*, 188—127.

Partial and Total Disability—Submission of Issues. Under the
11 terms of a policy providing for *partial* and total disability, the court need not submit the issue of partial disability on evidence which simply shows that the insured might perform some isolated and indefinitely defined duties of his profession. *Marren v. Fidelity & Cas. Co.*, 188—363.

Reformation of Application. The copy of the application ac-
12 tually attached to the policy may not be *reformed* in an action on the policy. (Sec. 1741, Code, 1897.) *Lyons v. Farm P. M. Ins. Assn.*, 188—506.

Death from Lightning—Evidence. Evidence of the actions of
13 animals and of the symptoms developed is admissible on the issue whether the animals were killed by lightning. Evidence held to present a jury question. *Lyons v. Farm P. M. Ins. Assn.*, 188—506.

Fraud as to Physical Insurability—Jury Question. On the issue
14 whether the insured fraudulently, knowingly, deceived the insurer as to insured's physical insurability, a jury question is presented by evidence tending to show: (1) That insured stated positively in the application that she had never had the ailment in question; (2) that she might have such an ailment and not know it; (3) that she stated to a physician, after the policy was issued, that she had been told that she did have such ailment; and (4) that she was, in fact, so afflicted. (Sec. 1812, Code, 1897.) *Bohen v. North American L. Ins. Co.*, 188—1349.

Evidence as to Fraud in re Insurability. Evidence that one
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TO

INTEREST

- 15 beneficiary surrendered his policy, on return of premium, is not admissible in an action on another policy, on the issue of fraud as to insurability, even though both policies were issued on the same application. *Bohen v. North American L. Ins. Co.*, 188—1849.

Reliance on False Representations. The insurer is presumed to
 16 rely on a false and material representation of fact, touching the insurability of insured, and it is not error to state in the instructions the necessity for such reliance. *Bohen v. North American L. Ins. Co.*, 188—1849.

Fraud in re Insurability—Instructions. On the issue whether
 17 the insured had, by fraud, caused the examining physician to certify to her insurability, it is not error to instruct that the fraud must have been actually perpetrated: that is, the company must have been defrauded of its policy. *Bohen v. North American L. Ins. Co.*, 188—1849.

FRATERNAL BENEFICIARY INSURANCE.

Prohibited Beneficiary—Foreign Company. A *foreign* fraternal
 18 beneficiary association may not, in a policy delivered by it in this state, validly make the indemnity payable to one who could not legally be such beneficiary in a policy issued by a *resident* association. (See Sec. 1824, Code, 1897; Sec. 1832, Code Supp., 1913.) *Weiditschka v. Supreme Tent K. M. W.*, 188—183.

Illegal Beneficiary—Insurer as Beneficiary. A fraternal bene-
 19 ficiary society may not validly provide that the society itself shall be the beneficiary in case the designated beneficiary shall fall for illegality. *Weiditschka v. Supreme Tent K. M. W.*, 188—183.

Indemnity Passing to Insured's Estate. Failure of a designated
 20 beneficiary, in a fraternal beneficiary certificate, to take the indemnity, because of illegality in such beneficiary to be such, passes the indemnity to the insured's estate. *Weiditschka v. Supreme Tent K. M. W.*, 188—183.

INTEREST. See APPEAL AND ERROR, 4.

INTOXICATING LIQUORS

TO

JUDGMENT

INTOXICATING LIQUORS.

Injunction—Presumption from Finding of Liquor. In an action to enjoin the maintenance of a liquor nuisance, where 36 quarts of whisky and 96 quarts of beer were found in defendant's resident garage, the presumption, under Sec. 2427, Code, 1897, as amended by Ch. 323, Acts 37 G. A., was that it was kept for the purpose of illegal sale; and the mere denial of the defendant that the liquor was kept for sale, and his statement was intended only for private use, were insufficient to overcome the statutory presumption. *McMillan v. Miller*, 188—264.

Medicated Intoxicant. Injunction will lie to restrain the sale of a combination of one fourth alcohol and certain medicinal substances, camouflaged as "bitters," and working the result of rendering the user full at the head and empty at the bowels at the same time. *State v. Andrews*, 188—626.

Contempt—Evidence. Evidence held sufficient to sustain a conviction for contempt. *Eaton v. Meyer*, 188—634.

JUDGMENT. See ELECTION OF REMEDIES; EVIDENCE, 5.

Vacation—Denial of Probate—Affirmative Fraud. An affirmative showing of fraud is necessary in order to justify the setting aside of an order denying probate of a will. Evidence reviewed in detail, and held insufficient to show fraud (a) in the conduct of the attorneys, (b) in the manner in which the guardian ad litem acted, (c) in the waiver of a jury, (d) in the failure to object to incompetent testimony, (e) in the belated filing of objections, and (f) in the agreement of beneficiaries under a former will personally to pay certain bequests contained in the will which was denied probate. In *re Estate of Kempthorne*, 188—70.

Vacation—Judgment Against Minors. Principle recognized that a minor may have a regular judgment set aside only on the same showing required of an adult. (Sec. 4091, Code, 1897.) In *re Estate of Kempthorne*, 188—70.

Finality of Adjudication. A defendant who, in an action for the recovery of the purchase price of property, defensively

JUDGMENT Continued

TO

LANDLORD AND TENANT

pleads and unsuccessfully litigates the question of fraud in the contract, may not again present such issue as the basis for a counterclaim in a subsequent and independent action by the same plaintiff, even though, in the first action, the plaintiff was also unsuccessful on the ground that he was pursuing the wrong remedy. *Sampson v. Jump*, 188—528.

Matter Litigated—Opinion of Court. In determining in one action the exact matter litigated in a former equity action embracing several issues, the court may resort to the *opinion* of the lower court. *Sampson v. Jump*, 188—528.

Default—War Activities as Excuse. Refusal to set aside a default fault will be reversed, when it appears that counsel intended in good faith to defend, and was prevented from so doing by the war activities in which he was engaged, coupled with a pardonable misunderstanding as to an adjournment of court. *Banks v. Taft Co.*, 188—559.

Conclusiveness—Adverse Possession. One may not, in an action involving title to real estate, set up a claim of title by adverse possession already adversely adjudicated against him, even though claimant has been long in possession since such adjudication. *Bryan v. Christianson*, 188—669.

Default—Non-Specific Affidavit of Merit. Affidavits of merit in applications to set aside defaults, should specifically recite the defensive facts. A general statement that the one in default "has a meritorious defense" is quite insufficient. *Shaffer v. Morgan*, 188—772.

LANDLORD AND TENANT. See CONTRACTS, 8, 9; PRINCIPAL AND AGENT, 2; TAXATION, 1.

Common Passageways—Duty of Landlord. A landlord who is pursuing the general practice of renting his premises to various tenants must maintain with reasonable care the stairways used in common by his tenants, even though, at the time in question, plaintiff, who was injured, was his only tenant. *Dillehay v. Minor*, 188—37.

Relief from Forfeiture. Equity will relieve from the forfeiture of a lease for doing exactly what the parties had agreed on,

LANDLORD AND TENANT Continued TO

LIFE ESTATES

but which, by mutual oversight, had been omitted from the lease. *Faringer v. Van de Hoef*, 188—323.

Waiver of Forfeiture. A lessor who agrees with his tenant as
3 to the amount of damages which will fully compensate him for a breach of the lease by the tenant, and accepts payment from the tenant, with the express or implied understanding that such payment settles all their difficulties, may not thereafter base a forfeiture of the lease on such breach. *Faringer v. Van de Hoef*, 188—323.

Excessive Levy for Intermingled Claims—Remedy. In an ac-
4 tion for a *definite* amount of rent, to which is added a claim for a *definite* amount of money loaned, defendant's remedy for an excessive levy under the landlord's attachment is not by motion for a dissolution and discharge of the attachment *in toto*. *Kladivo v. Hospodarsky*, 188—1208.

LAW OF THE ROAD. See HIGHWAYS, 9—15.

LIBEL AND SLANDER.

Privilege Attending Affidavit in re Pensioner. An affidavit bearing on the health, mental condition, disposition, and habits of a pensioner of the United States, prepared under the orders and in accordance with the directions of the Federal commissioner of pensions, is at least qualifiedly privileged, and no action for libel will lie thereon, in the absence of evidence by plaintiff that the affiant was actuated by malice. *Fleagle v. Goddard*, 188—1033.

LIFE ESTATES.

Mortgage of Fee by Life Tenant. Testamentary power to a life
1 tenant of real estate to mortgage the property, in order to raise funds for the discharge within a named time of specified legacies which are made a lien on all the land, and which become the personal debt of the life tenant by the act of taking under the will, embraces the power to mortgage the *fee* for the amount of said legacies and the interest accumulating thereon. *Security Sav. Bank v. Williams*, 188—904.

MASTER AND SERVANT Continued

making part payment. It follows that, in such case, the employee may, to protect his lien on the bond, maintain a direct action against the insurer, irrespective of the solvency of the employer. (See Secs. 2477-m25, 2477-m48, Code Supp., 1913.) *Den Adel v. Casualty Co. of America*, 188—1.

“*Arising Out of and in the Course of Employment.*” Evidence
9 reviewed, relative to the scope of a workman's employment and the circumstances attending his death without eyewitnesses, and held to support a finding that the death arose out of and in the course of the employment. *Grant v. Fleming Brothers Co.*, 188—637.

Revival of Dormant Disease. The Workmen's Compensation Act
10 embraces recovery for all the natural consequences of an injury “arising out of and in the course of” an employment, even though the major part of such consequences results from a slight initial injury, fanning into life a pre-existing, dormant disease, i. e., gonorrhoea. *Hanson v. Dickinson*, 188—728.

Occupational Disease and Injury Aggravated by Disease. The
11 provision of the Workmen's Compensation Act that personal injury “shall not include a disease, except as it shall result from the injury,” is intended to exclude *occupational* diseases from the category of personal injuries. *Hanson v. Dickinson*, 188—728.

Appeal. Statutes authorizing appeals apply to causes arising
12 before and pending at the time of the enactment. *Hoover v. Central Iowa Fuel Co.*, 188—943.

Child with Stepfather Not Dependent of Natural Parent. A
13 child under 16 years of age who has a stepfather may not recover under the Workmen's Compensation Act for the death of the natural parent. *Hoover v. Central Iowa Fuel Co.*, 188—943.

Rejection—Assumption of Risk and Negligence. Assumption of
14 risk and nonwillful negligence are not permissible issues in an action by an injured servant against a master who has rejected the provisions of the Workmen's Compensation Act. *Butkovitch v. Centerville Block Coal Co.*, 188—1176.

MECHANICS' LIEN

TO

MORTGAGES

MECHANICS' LIEN.

Right to Lien—Perfecting of Lien by Materialman. Where an owner has knowledge that materials were furnished on credit, or has knowledge of such circumstances as would put him on inquiry, and where payment was not made strictly in accordance with the terms of the contract, the materialman had the right, under the law, to perfect his lien by complying with the statute. *Orcutt Co. v. Schlappi*, 188—378.

MINES AND MINERALS. See MASTER AND SERVANT, 3-7; NEGLIGENCE, 10; WITNESSES, 5.

MORTGAGES. See CONTRACTS, 4, 6; FIXTURES; LIFE ESTATES.

Foreclosure and Redemption—Appeal from Foreclosure Judgment.

- 1 The right to redemption of land sold under a mortgage foreclosure is, under Sec. 4045, Code, 1897, cut off by an appeal from the foreclosure judgment. *Korf v. Howerton*, 188—120.

Foreclosure and Redemption—Presumption of Regularity of Sale.

- 2 A recital in a sheriff's deed that the sale was made in accordance with the order of the court, and in pursuance of the statute in such case made and provided, in a case where it is claimed that the sale should have been made without right of redemption, did not show that it was made subject to right of redemption within a year, as there would be a presumption in favor of the regularity of official conduct, and such recital tended to establish that the sale was, in all respects, regular. *Korf v. Howerton*, 188—120.

Foreclosure and Redemption—Premature Issuance of Deed. The

- 3 premature issuance of a sheriff's deed, before the expiration of time of redemption, is a mere irregularity, and does not invalidate the sale or deprive the judgment debtor of the right to redeem, and the title remains in him until the expiration of the time allowed for redemption. (Secs. 4044, 4045, Code, 1897.) *Korf v. Howerton*, 188—120.

MORTGAGES Continued

TO

MUNICIPAL CORPORATIONS

Transfers Subject to Mortgage—Duty of Vendee to Pay. A ven-

- 4 dee who takes conveyances of land subject to specified existing mortgages thereon must pay such mortgages if the amount thereof was retained by him out of the purchase price, and parol evidence is admissible to show the actual consideration paid. *Hawn v. Malone*, 188—439.

Discharge by Vendor—Recovery Over Against Vendee. A ven-

- 5 dor of land who, subsequent to the conveyance, has been compelled to discharge an incumbrance on the land because of the vendee's failure to perform his implied promise to discharge it, may not recover of the vendee *more* than he paid to effect the discharge—may not compromise the claim, and then charge the vendee with the full face of the claim. *Hawn v. Malone*, 188—439.

Mortgagee in Possession—Rents. A mortgagee in possession.

- 6 under an agreement to credit mortgagor with a specified annual rental, will be charged with the fair, reasonable rental from the date when he wrongfully refuses to permit the mortgagor to redeem. *McGuire v. Halloran*, 193—479.

MOTIONS.

Must Be Ruled On as Presented. Courts must pass on motions as presented—may not so recast an excessive motion as to give to movent that to which he is entitled. So held as to a motion to dissolve an attachment *in toto*, when movent's right was limited to a dissolution of attachment of *part* of the property. *Kladivo v. Hospodarsky*, 188—1208.

MOTOR VEHICLES See HIGHWAYS, 13—15.**MUNICIPAL CORPORATIONS.** See BRIDGES; FRANCHISES; HIGHWAYS, 6; TAXATION, 2.**OFFICERS, AGENTS, AND EMPLOYEES.****Proceedings of Council—Councilman Interested in Result.** An

- 1 ordinance vacating a street, passed by the vote of a councilman who was to be personally benefited by receiving

MUNICIPAL CORPORATIONS Continued

the fruits of the vacation, is void. (Sec. 668, Par. 14, Code Supp., 1913.) *Krueger v. Ramséy*, 188—861.

PUBLIC UTILITIES.

Primary and Secondary Negligence—Recovery. A city which
2 has paid damages consequent on its neglect to compel a public utility licensee to perform its implied *primary* duty to maintain its street equipment in a safe condition, may recover over against such licensee. Such facts do not present a case of joint tort-feasors. *City of Des Moines v. Des Moines Water Co.*, 188—24.

Rates. A heat, gas, electric light or power, or water franchise,
3 duly approved by the electors, is at all times under the control of the city council, in so far as a reasonable upward or downward revision of the rates is concerned. *Selkirk v. Sioux City G. & E. Co.*, 188—389.

PUBLIC IMPROVEMENTS.

Exempting Public Utility from Assessment. A municipal corporation has no power to relieve a street railway from its
4 statutory duty to construct, reconstruct, and repair the paving or flooring between and adjacent to the rails of its track on public bridges. Irrespective of this holding, ordinances reviewed, and held not to constitute an attempt to grant such exemption. *Burlington R. & L. Co. v. City of Burlington*, 188—272.

Equitable Considerations Relieving from Assessment. The fact
5 that a public utility company had, for 23 years, annually paid an agreed sum into the city bridge fund toward the maintenance of a bridge on which its tracks were laid, presents no equitable considerations for relieving the company of a statutory assessment for flooring the bridge. *Burlington R. & L. Co. v. City of Burlington*, 188—272.

Assessment Proceedings. Proceedings of a special charter city
6 in re pavement of streets reviewed, and held conformable to statutes, Secs. 965, 971, Code Supp., 1913. *Miller v. City of Glenwood*, 188—514.

MUNICIPAL CORPORATIONS Continued

Notice—Publication in Special Charter City. Publication of notice of proposal to establish a paving improvement in a special charter city need be published for the required time in but *one* newspaper. Sec. 823, Code Supp., 1913, requiring publication in *two* newspapers, pertains only to non-special-charter cities. *Miller v. City of Glenwood*, 188—514.

Contract Price Exceeding Estimate. The aggregate contract price for paving may, in the absence of fraud, exceed the engineer's preliminary estimate of cost. *Miller v. City of Glenwood*, 188—514.

STREETS AND ALLEYS.

Sunken Walk. Negligence is not established by a showing that a public walk was allowed, for several years, to remain in a slightly sunken condition, when it was not shown that such condition materially affected its solidity, safety, or usefulness. *City of Des Moines v. Des Moines Water Co.*, 188—24.

Snow and Ice—Non-Liability for Natural Conditions. No legal duty rests upon a city to remove snow and ice from a sidewalk, so long as it remains unchanged by the interference of man or other artificial cause; and such duty arises only when, by reason of interference with natural conditions, the coating of snow and ice becomes rigid or rounded or uneven, or is made to assume some other form, or to present some other danger than results solely from natural causes. *Gregg v. Town of Springville*, 188—239.

Icy Sidewalks. Evidence reviewed, in an action against a town by a pedestrian injured by falling on an icy sidewalk, and held sufficient to go to the jury on the question of the negligence of the town in permitting natural deposits of snow and ice to become rough, rounded, and slanting, so as to make it unsafe for travel. *Gregg v. Town of Springville*, 188—239.

Notice as to Icy Sidewalk. Evidence reviewed, in an action against a town by a pedestrian injured by a fall on an icy sidewalk, where the rough condition of the ice had existed

MUNICIPAL CORPORATIONS Continued

three weeks or more before the injury, and held sufficient to go to the jury on the question whether, in the reasonable exercise of its duty, the town knew of such condition, or should have discovered and remedied it before the injury. *Gregg v. Town of Springville*, 188—239.

Obstructions—Negligence. Evidence reviewed, in an action for 13 damages for personal injuries from wires placed across the street, and held sufficient to go to the jury on the question of the town's negligence in permitting the stretching of wires across a street between telegraph and electric light poles on either side, and the placing of a banner thereon, and in not guarding against the effect of the wind, which caused the poles to lean towards the street and the wires to slip down. *Kiple v. Incorporated Town of Clermont*, 188—248.

Vacation of Streets. Principle recognized that cities and towns 14 have plenary powers to vacate streets, and thereafter convey the same, so long as the property owner is afforded reasonable opportunity to pass to and from his property. (Sec. 751, Code Supp., 1913; Sec. 883, Code, 1897.) *Krueger v. Ramsey*, 188—661.

TORTS.

Excavations in Street—Jury Question. A jury question on the 15 issue of negligence and contributory negligence is presented by testimony tending to show that, in the sidewalk part of a street, an unguarded excavation, from 6 to 10 feet long, and from 3 to 10 inches deep, had existed for many months, and that plaintiff, unfamiliar with such condition, fell into such excavation on a dark night. *Daniels v. Iowa City*, 188—1012.

Defective Street—Service of Notice of Injury. Service on a 16 city of notice of injury by reason of defective street may be made by taking from the mayor an acknowledgment of service of such notice. *Daniels v. Iowa City*, 188—1012.

Notice of Injury—Jury Issue as to Sufficiency. Evidence re- 17 viewed, and held to present a jury question on the issue whether the *date* of an injury was stated in a notice at

MUNICIPAL CORPORATIONS Continued to

NEGLECT

the time it was acknowledged by the mayor. *Daniels v Iowa City*, 188—1012.

TAXATION.

Limitation on Debt—“Value of Taxable Property.” The constitutional limitation on the right of a city to become indebted is 5 per cent on the actual value of all the property, both real and personal, returned by the assessor for taxation purposes, and not 5 per cent on the one-fourth part of such value on which the levies are computed. (Sec. 3, Art. 11, Iowa Const.) *Miller v. City of Glenwood*, 188—514.

Special Charter Cities—Limitation on Debt. The only limitation on the right of a special charter city to become indebted is the 5 per cent limitation provided in Sec. 3 of Art. 11 of the Constitution. *Miller v. City of Glenwood*, 188—514.

Limitation on Debt—Cash on Hand. Outstanding bonds and warrants should be reduced by the amount of available cash on hand, in determining the debt of a city as a basis for applying the constitutional or statutory limitations on indebtedness. *Miller v. City of Glenwood*, 188—514.

NEGLECT. See HIGHWAYS, 13; INSURANCE, 9, 10; MASTER AND SERVANT; MUNICIPAL CORPORATIONS, 9-13, 15; RAILROADS.

ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

Protruding Water Pipe in Sidewalk. The act of a water company in allowing a water pipe, originally flush with the sidewalk, to remain for two years some 2 or 3 inches above the sidewalk, owing to the gradual sinking of the walk, presents a jury question on the issue of the company's negligence. *City of Des Moines v. Des Moines Water Co.*, 188—24.

Failure to Maintain Lookout on Public Road. One traveling on a public highway must maintain a reasonable lookout for others lawfully thereon. Evidence reviewed, and held to present a jury question on the issue of a driver's negli-

NEGLIGENCE Continued

gence, resulting in injury to a party of coasters. Roennau v. Whitson, 188—138.

Street Car Passenger Alighting at Unusual Place. Negligence
3 *per se* may not be predicated on the act of a street railway company in permitting a mature passenger, in full possession of his faculties, voluntarily to alight at a reasonably safe point other than at street intersections—the usual stopping point. Chesley v. Waterloo, C. F. & N. R. Co., 188—1004.

Violation of Law—Effect. Failure to give the law-required signals of the approach of a car which was moving up behind an injured party presents a jury question on the issue of defendant's negligence. Haven v. Chicago, M. & St. P. R. Co., 188—1266.

CONTRIBUTORY NEGLIGENCE.

Choosing Less Safe of Two Ways. Knowingly choosing the less
5 safe of two ways does not *per se* establish either (a) assumption of risk or (b) contributory negligence. So held as to two stairways. Dillehay v. Minor, 188—37.

Insulated Electric Wires. A jury question is presented on the
6 issue of contributory negligence when the jury might find that the deceased unnecessarily took hold of an insulated electric wire, with knowledge, and after being warned, of its dangerous condition. Eason v. Des Moines Elec. Co., 188—43.

Coasting Party. Evidence reviewed, and held insufficient to
7 show contributory negligence *per se* on the part of young people using a country road for coasting purposes. Roennau v. Whitson, 188—138.

Reasonable Care. Plaintiff is not guilty of contributory negligence if, under all the circumstances, it can reasonably be found that he is exercising the reasonable care of an ordinarily prudent person. Direct, affirmative proof of particular acts is not required. Gregg v. Town of Springville, 188—239.

NEGLIGENCE Continued

Unusual Definition. It is not error to define contributory negligence as negligence which "helps" to produce an injury. *Willis v. Schertz*, 188—712.

Injury in Mine Entry. A miner, injured by a fall of rock in an entry, may not be said to be guilty of negligence, when the place of injury was not his usual place of work, when he was present at said place under orders of his superior, did not know of the dangerous condition there existing, and was charged with no duty with reference to said place. *Owens v. Norwood-White Coal Co.*, 188—1092.

Distracted Attention. One who has his attention diverted, in a place of danger, presents a jury question on the issue of contributory negligence, if his conduct was such as to be in harmony with what reasonably careful men would have done, under like circumstances. *Held*, such question was presented in the case of one who, with a pane of glass in his hands, was running in the mud after his hat, in the presence of a smoke-enshrouded train, which was approaching without signal. *Haven v. Chicago, M. & St. P. R. Co.*, 188—1266.

IMPUTED NEGLIGENCE.

Common Enterprise—Coasting Party. Principle recognized that the mere showing that several parties were engaged in a common enterprise is not sufficient to charge one with the negligence of another, but that it must further appear that the injured person had the right, or assumed the right, to control the conduct of the negligent person. *Roennau v. Whitson*, 188—138.

Biding on Invitation. A person riding with another on invitation is not chargeable with the negligence of the driver on the mere showing that they are engaged in a "common" enterprise. It must appear that the invited party *had* the right or *assumed* to have the right to control the movements of the driver. *Wagner v. Kloster*, 188—174.

ACTIONS.

Evidence—Sufficiency. One may not say that he was under no obligation to exercise an act of care toward another be-

NEGLIGENCE Continued

TO

NEW TRIAL

cause he did not *know* of the presence of such other, when the facts and circumstances would justify a finding that, in the exercise of reasonable care, he *would have known* of such presence. Roennau v. Whitson, 188—138.

Last Clear Chance—(When Doctrine Applicable. The “last clear
15 chance” doctrine is applicable whenever two parties are concurrently negligent, but one of the parties discovers the negligence of the other in such time that, by the exercise of reasonable care, he might have avoided the injury, and does not do so. Roennau v. Whitson, 188—138.

Last Clear Chance—Failure to Discover. The “last clear chance”
16 doctrine has no application when the record affirmatively discloses that the peril of the injured party was never discovered until after the accident. McCabe v. Minneapolis & St. L. R. Co., 188—642.

Pleading—Paraphrase by the Court. A paraphrase by the court,
17 in its instructions, of the negligence pleaded, examined, and held to be within the pleadings. Willis v. Schertz, 188—712.

Elevator Accident. Evidence reviewed, and held sufficient to
18 sustain a verdict for negligence in the operation of a freight elevator. Stukas v. Warfield-Pratt-Howell Co., 188—878.

No-Eyewitness Rule. Principle recognized that, in the absence
19 of any eyewitness to an accident, the law will presume due care. Stukas v. Warfield-Pratt-Howell Co., 188—878.

Evidence—Repairs Subsequent to Injury. Repairs to a place of
20 injury subsequent to the time of injury may not be shown for the purpose of establishing negligence at the time of injury, but such evidence may be admissible on other material issues arising in the case. Butkovitch v. Centerville Block Coal Co., 188—1176.

NEW TRIAL.

Appeal from Order Granting—Reversal. Error results from the
1 granting of a new trial, when the evidence is not in controversy, and the record affirmatively shows that, as a mat-

NEW TRIAL Continued

TO

PARENT AND CHILD

ter of law, plaintiff cannot, in any event, recover. *Cooper W. & B. Co. v. National B. F. Ins. Co.*, 188—425.

Insufficient Evidence—Conflict—When Properly Raised. Insuf-
2 ficiency of evidence to support a verdict, or inconsistency
between evidence and verdict, may be raised for the first
time in a motion for new trial. *State v. Dolson*, 188—629.

Verdict—Excessiveness—\$1,150. Verdict for \$1,150 for person-
3 al injury held not excessive. *Willis v. Schertz*, 188—712.

Excessive Verdict. Verdict for \$2,250 in bastardy proceedings
4 held nonexcessive. *State v. Carey*, 188—1308.

Non-Trial Judge—Measure of Discretion. The discretion of a
5 non-trial judge in passing on a motion for new trial is
measured *solely by the record before him*. *Underwood v.*
Leichtman, 188—794.

Movant Responsible for Conflicting Instructions. New trial may
6 be granted because of conflicting and irreconcilable instruc-
tions, even though the movant for new trial did, *in part*,
invite the conflict by his requested instructions. *Hunt v.*
Des Moines City R. Co., 188—1068.

Power of Court to Grant without Motion. A court may grant
7 a new trial on its own motion, whenever satisfied that it
has prejudicially misdirected the jury. So held where, in
an action by a passenger against a carrier for personal in-
jury, the instructions (1) required defendant to show plain-
tiff's contributory negligence, (2) required plaintiff to show
freedom from contributory negligence, (3) treated contribu-
tory negligence as a defense, and (4) failed to direct that
contributory negligence was only pleadable in mitigation
of damages. *Hunt v. Des Moines City R. Co.*, 188—1068.

NUISANCE. See HIGHWAYS, 12.

PARENT AND CHILD. See ADOPTION; DIVORCE, 8-10;
EXECUTORS AND ADMINISTRATORS, 5; HUSBAND AND WIFE;
MASTER AND SERVANT, 13.

PARENT AND CHILD Continued

TO

PARTITION

Right of Worthy Parent Not Absolute. A parent of good character does not necessarily possess an *absolute* right to the custody of his or her minor child. The best interest of the child is paramount on the issue of custody. *Sandine v. Johnson*, 188—620.

Right to Custody of Child. Evidence reviewed, and held to show that the interests of the child in question would best be conserved by remaining with its grandparents. *Delashmutt v. McCoy*, 188—683.

PARTIES. See ACTIONS; APPEAL AND ERROR, 29; TRIAL, 12.

Improper Joinder. Defendant in an action for breach of an executory contract to convey a lot, pleading that the description of said lot was inserted in the contract by mistake of the scrivener, in copying the same erroneous description from a like but independent contract of his immediate grantor, may not implead said immediate grantor on the theory that, if defendant fails to prove the mistake, his immediate grantor is liable over to him. *Markley v. Lockwood*, 188—357.

PARTITION.

Necessary Parties. Partition of lands between tenants in common will not be entertained unless *all* persons interested therein are made parties, plaintiffs or defendants. So held where certain members of a dissolved and fully settled partnership sought partition of that part of the property which was separately owned in common by the *partners*, without joining other tenants in common, who were strangers to the partnership. *Curtis v. Reilly*, 188—1217.

Inherently Defective Decree. A decree of partition of the interest of partners in lands, being inherently defective because of failure to bring in other owners of the land, may not be sustained on the after-thought plea that the action was, in substance, a settlement of partnership matters. *Curtis v. Reilly*, 188—1217.

PARTNERSHIP

TO

PLEADING

PARTNERSHIP. See **BROKERS**, 3.

Wrongful Suit—Contribution. A partner who, subsequent to the
 1 dissolution of the partnership, is wrongfully sued in tort
 on a partnership transaction may not enforce contribution
 from his former partner for the expense attending such
 suit. *Hadley v. Coffin*, 188—896.

Partner's Interest in Lands of Fully Settled Partnership. Part-
 2 ners of a dissolved and fully settled partnership which has
 lands as a balance of assets, are just as much tenants in
 common with nonpartnership owners of lands as though
 there had never been a partnership, and each of the part-
 ners and nonpartners had individually bought his respec-
 tive interest in the property. It follows that there may
 not be partition of the partner's interests without joining
 the nonpartnership owners. *Curtis v. Reilly*, 188—1217.

Profits and Losses—Land Deal. Two parties are not *partners*,
 3 as between themselves, when one party is obligated to
 bear *all* the expense and *all* the losses, while the other
 party is to have half the ultimate *profits*. So held in a
 land deal, wherein the profit-sharing beneficiary was denied
 a partnership accounting. *McCarney v. Lightner*, 188—
 1271.

PENSIONS. See **HOMESTEAD**, 3; **LIBEL AND SLANDER**.**PLEADING.**

Matters of Inducement. Matters explanatory of the circum-
 1 stances under which a contract was made are proper: e.
 g., the family relationship existing between the parties.
Herron v. Brinton, 188—60.

Voluntary Issues. Parties are bound by material, nonpaper is-
 2 sues, voluntarily litigated by them. *Messenger v. Messen-*
ger, 188—367.

Construction—Understanding of Parties. Pleadings will be con-
 3 strued in harmony with the mutual understandings of the
 parties, while the real merits are under consideration. *Be-*

PLEADING Continued

TO

PRINCIPAL AND AGENT

lated construction, born of a desire for technical advantage, will not be tolerated. So held where exemption claim was made to *brown* mules, when they were *days*. *Augustine v. Gold*, 188—551.

Amendments—Belated and Inconsistent Amendments. Amendments bearing on the measure of damages, and offered at the close of movant's evidence, are properly rejected (1) when they do not enlarge the measure of damages, and (2) when they are contradictory of record stipulations. *Sietsema v. Anderson*, 188—651.

Demurrer—Admission of Legal Conclusion. Demurrers do not admit averments which put constructions on exhibited writings contrary to what the writings *necessarily* show on their face. *Steil-Hahn Co. v. Western Union Tel. Co.*, 188—707.

Amendment Amplifying Point. The allowance of amendments which amplify points already sufficiently pleaded is discretionary with the court. *Bohen v. North American L. Ins. Co.*, 188—1349.

PRINCIPAL AND AGENT. See APPEAL AND ERROR, 18;
BROKERS; CONTRACTS, 12.

Liability of Agent—Nonfeasance. An agent is not personally liable to a third person for mere nonfeasance. *Wendland v. Berg*, 188—202.

Liability of Agent—Rental of Defective Premises. Agents who rented real property to a tenant were not liable for an accident resulting from the giving away of a filled well, where, although they knew that the well had been filled, they knew nothing which would cause them to believe there was any danger, and where there was no duty of inspecting the same, even as between them and their principal. *Wendland v. Berg*, 188—202.

Rights and Liabilities as to Third Persons—Repudiation of Acts of Agent. A principal may not repudiate the acts of his agent, as being in excess of authority, while he retains the fruits of the unauthorized acts. *First Nat. Bk. v. Athey*, 188—330.

PRINCIPAL AND AGENT Continued TO

RAILROADS

Proof of Agency. Agency may be proven by the testimony of
4 the agent. *Lyons v. Farm P. M. Ins. Assn.*, 188—506.

Authority of Agent—Borrowing Money. Principle recognized
5 that the power in an agent to borrow money on behalf of
his principal will be found only on an exceptionally clear
showing of such power. *Isaac & Co. v. Lindsey & Co.*,
188—947.

Fraud by Agent of Corporation. A corporation which concedes
6 that, in the making of a land sale contract, it was repre-
sented by a named person, may not say that such person
had no authority to make representations in regard to the
land. *Harris v. Polk County Inv. Co.*, 188—1259.

PRINCIPAL AND SURETY. See APPEAL AND ERROR, 30.

Liability of Surety—Unnamed Beneficiary. A subcontractor
may maintain an action on the performance bond of a
public contractor, when such bond is conditioned "to dis-
charge all lienable claims that may be due to any person,"
even though such bond runs only to the *public corporation*.
Clinton Bridge Works v. Kingsley, 188—218.

PROCESS. See MUNICIPAL CORPORATIONS, 16, 17.

Foreign Corporation—Coupon Tickets. The sale in this state
by a resident carrier of a ticket which, under traffic ar-
rangement with a foreign carrier, routes the passenger
over the lines of such foreign carrier, does not make the
selling carrier the agent of the foreign carrier; neither
does such sale constitute a "doing of business" in this
state by such foreign carrier. (Sec. 3529, Code Supp., 1913;
Sec. 3532, Code, 1897.) *Jones v. Illinois Cent. R. Co.*, 188—
850.

RAILROADS. See BURGLARY, 1, 2; CONSTITUTIONAL LAW,
3; NEGLIGENCE, 4, 11.

Accidents on Tracks—Contributory Negligence. Contributory
1 negligence results, as a matter of law, from the act of know-
ingly placing the foot of a ladder so close to the track of
a railway that it will be hit by a passing train, and work-

RAILROADS Continued

TO

RECEIVERS

ing thereon, with an unobstructed view of the track for three quarters of a mile, even though plaintiff testifies that he constantly looked and listened for approaching trains. *McCabe v. Minneapolis & St. L. R. Co.*, 188—642.

Injury to Passenger—Negligence. Evidence reviewed, and held
2 to present a jury question on the issue of contributory negligence in a case where deceased, in the nighttime, at a railway station, and in a place of danger, but in compliance with the rules of the company, was signaling a train to stop. *Carlisle v. Davenport & M. R. Co.*, 188—676.

RAPE.

Opportunity and Complaints as Corroboration. Opportunity to
1 commit rape, and complaints by prosecutrix that the accused had committed such an act on her, will not constitute the required corroboration. *State v. John*, 188—494.

Complaints Not Constituting Res Gestae. Complaints by prosecutrix as to the alleged assault upon her, made at a time after she had had time to premeditate and deliberate, and after she had premeditated and deliberated, are not admissible. *State v. John*, 188—494.

Physical Incapacity—Effect. Physical incapacity of defendant
3 to consummate or commit an act of sexual intercourse is, while not a defense, relevant to the issue of intent. *State v. John*, 188—494.

RECEIVERS.

Contracts Extending Beyond Receivership. One who, without
1 the approval of the court, enters into a contract with a receiver for a definite time, with knowledge that the receiver was contemplating an early closing of the business by a sale, may not hold the trust funds for damages consequent on a breach of the contract because of a sale prior to the expiration of the contract period. *First Nat. Bank v. White Ash Coal Co.*, 188—1227.

Unauthorized Contract—Acquiescence. Creditors who are entitled to the funds derived from a receivership may not
2 be said to have "acquiesced" in an unauthorized contract

RECEIVERS Continued

TO

REMAINDERS

by the receiver, from the naked fact that they had some indefinite knowledge of such contract. First Nat. Bank v. White Ash Coal Co., 188—1227.

REFORMATION OF INSTRUMENTS. See INSURANCE, 12.

Belated Claim of Mistake. One who, without complaint, accepts delivery of property under a written contract as then written, with full knowledge that such contract does not contain a certain guaranty, may not, when called on for payment, ask for a reformation of the contract, on the plea that said guaranty was inadvertently omitted from the contract, and especially when his failure to pay for the property at the time of acceptance, as provided in the contract, was an act of bad faith. Evidence reviewed in *extenso*, and held insufficient to justify reformation for mistake. Halver v. Higgins S. C. Co., 188—806.

RELEASE.

Validity—Mistaken or Fraudulent Statements. A jury question

- 1 on the issue whether a release of damages was void is manifestly presented by evidence tending to show that it was obtained for a grossly inadequate consideration, at a time when the plaintiff, an uneducated and inexperienced man, was enfeebled in body and mind, and by mistaken or fraudulent statements, to the effect, among other things, that plaintiff was not permanently injured, had no broken bones, and would be at work in a short time. Owens v. Norwood-White Coal Co., 188—1092.

Evidence—Physical and Mental Condition. Evidence of the

- 2 mental and physical condition of an injured party is admissible on the issue whether a release of damages was procured by fraud or mistake. Owens v. Norwood-White Coal Co., 188—1092.

REMAINDERS. See LIFE ESTATES: TAXATION, 10, 11.

REPLEVIN

TO SCHOOLS AND SCHOOL DISTRICTS

REPLEVIN.

Formal Allegation of Cause of Detention. Plaintiff's formal allegation in replevin of "*the facts constituting the alleged cause of detention*" by defendant creates no issue—requires no negating evidence by plaintiff. *Banks v. Lohmeier*, 188—722.

ROBBERY.

Evidence—Sufficiency. Evidence held to present jury question as to defendant's guilt. *State v. Bogardus*, 188—1293.

SALES. See **BILLS AND NOTES, 5**; **ELECTION OF REMEDIES.**

Implied Warranty—Reasonable Fitness. An implied warranty
1 of *reasonable fitness* accompanies the purchase of an un-inspected article by a buyer who expressly makes known to the vendor the *use* to which the article will be put, and the *conditions* under which it will be operated, and who relies on the vendor's skill and judgment. *Sturtevant Co. v. LeMars Gas Co.*, 188—584.

Divisibility of Contract. A contract for the purchase of two ar-
2 ticles, separately priced, and intended for separate and independent use, is *divisible*, even though both articles were delivered together, under one acceptance, and at an aggregate price. *Sturtevant Co. v. LeMars Gas Co.*, 188—584.

Election of Remedies—Rescission (?) or Damages (?) A buyer
3 may rescind for breach of warranty, or may retain the article and sue for damages consequent on the breach. *Sturtevant Co. v. LeMars Gas Co.*, 188—584.

SCHOOLS AND SCHOOL DISTRICTS.

Selection of Schoolhouse Site—Vote of Electors—Effect. A ma-
1 jority vote of school electors, cast in connection with a defeated bond proposition, in favor of retaining an old schoolhouse site, and personal pledges of divers directors to abide by such vote, do not deprive the directors of their statute-given power, on a *subsequent* voting of bonds, to select a new site and employ the proceeds of the bonds thereon. *Munn v. Independent Sch. Dist.*, 188—757.

SCHOOLS AND SCHOOL DISTRICTS Continued TO STATUTES

Selection of Schoolhouse Sites—Review by Court. Selections of
2 schoolhouse sites are nonreviewable by the courts, so long
as the directors act within their statute-given powers.
Munn v. Independent Sch. Dist., 188—757.

SEDUCTION. See FRAUDS, STATUTE OF, 1-4.

SPECIFIC PERFORMANCE.

Contracts Enforcible—Sufficiency of Evidence. Evidence re-
1 viewed, in an action for specific performance of a contract to
sell land, and held sufficient to establish the same. Scott
v. Habinck, 188—155.

Contracts Enforcible—Inadequate Consideration. Inadequacy of
2 consideration is, in itself, an insufficient ground for refus-
ing specific performance of a contract, unless so gross as
to shock the conscience. Scott v. Habinck, 188—155.

Contracts Enforcible—Fraud in Obtaining Wife's Signature.
3 Where the wife's signature to the contract for the sale of
land was only necessary in order that her husband might
be held to specific performance, and that she might be
forced to join if she refused, she having no interest except
her dower right, and not furnishing title to land, the fact
that her signature was obtained by fraud was no defense
by her husband to prevent specific performance. Scott v.
Habinck, 188—155.

Fraud—Failure of Title. Fraud and failure to furnish mer-
4 chantable title as agreed will defeat a prayer for specific
performance. Crom v. Henderson, 188—227.

Fraud and Mental Incompetency as Defense. Insufficient evi-
5 dence of fraud, plus insufficient evidence of mental in-
competency, may justify the court, in the exercise of a
sound discretion, in refusing specific performance. Wright
v. Pirie, 188—1166.

STATUTES. See CONSTITUTIONAL LAW, 3.

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STREET RAILWAYS. See CARRIERS, 3; FRANCHISES;
MUNICIPAL CORPORATIONS, 4, 5; NEGLIGENCE, 3.

TAXATION.

LIABILITY OF PERSONS AND PROPERTY.

"Tax" Defined. The term "tax" ordinarily embraces no more
1 than the customary and annual taxes. So held where an
agreement by a tenant to pay all "taxes and assessments"
was held not to include Federal income or excise taxes.
Des Moines Union R. Co. v. Chicago G. W. R. Co., 188—
1019.

EXEMPTIONS.

Municipal Waterworks. A municipal reservoir (as part of a
2 city waterworks), consisting of a lake 10 acres in area,
and of some 75 acres of surrounding land, seeded down to
prevent erosion of soil into the lake, is exempt from taxa-
tion, even though the city does, *incidentally*, collect rental
from the latter land. City of Osceola v. Board of Equaliza-
tion, 188—278.

Nontaxable Surplus Insurance Fund. The funds of a nonstock
3 and nondividend-paying mutual fire insurance company are
not locally assessable when such funds are accumulated by
collecting excess premiums in advance, and, at the termina-
tion of the policy, and in accordance therewith, returning to
the policyholder the excess over and above the cost of
insurance. Appeal of Mill Owners M. F. Ins. Co., 188—
664.

COLLECTION.

Distress and Sale—Limitation. Taxes may be collected by dis-
4 tress and sale under execution, even after the lapse of five
years from the entry on the treasurer's books. Collins Oil
Co. v. Perrine, 188—295.

FORFEITURES AND PENALTIES.

TAXATION Continued

Cancellation of Interest and Penalties. Failure to pay taxes

- 5 within four years after the close of the year in which the books are first turned over to the treasurer *ipso facto* cancels all interest and penalties. [But now see Ch. 79, Acts 36 G. A. (1915).] *Collins Oil Co. v. Perrine*, 188—295.

INHERITANCE TAXES.**Collateral Inheritance—Proceeds of Foreign Real Estate. The**

- 6 proceeds of foreign real estate belonging to a resident testator are subject to the succession tax of this state when such real estate has, from imperative necessity, been converted into personalty, in order to pay legacies to collateral heirs, even though such proceeds have not been manually brought into this state, and are subject to a succession tax under the laws of the foreign state. (Sec. 1481-a, Code Supp., 1913.) *In re Estate of Sanford*, 188—833.

Collateral Inheritance—Equitable Conversion of Foreign Lands—

- 7 **Limitation.** The doctrine of equitable conversion of realty into personalty will not, in an estate consisting of both domestic and foreign realty, be carried so far in the interest of the succession tax of this state, and to the detriment of general residuary legatees, as to compel the conversion of all such foreign lands into personalty and the application of the entire proceeds to the discharge, in this state, of money legacies. To so do might bring the entire estate under our succession tax, though part of the estate might be foreign realty passing in fee. In the instant case, *held* that the transfer of the residuary estate should be here taxed in the proportion that the total net value of the estate in the foreign state bears to the total net value of the entire estate. *In re Estate of Sanford*, 188—833.

Collateral Inheritance—"Debts"—Federal and Succession Taxes.

- 8 Neither succession taxes nor Federal inheritance taxes are "debts" against an estate in such sense that they may be deducted in the computation of the state succession tax. (Sec. 1481-a2, Code Supp., 1913.) *In re Estate of Sanford*, 188—833.

Collateral Inheritance—"Debts"—Income and Current Taxes.

- 9 Accrued Federal income taxes, and current general taxes

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lienable at the death of decedent, are proper deductions in computing state succession taxes. (Sec. 1481-a2, Code Supp., 1913.) In re Estate of Sanford, 188—833.

Tax Accrues on Death of Decedent—Effect of Subsequent Treaty.

- 10 The right of the state to a collateral inheritance tax accrues,—becomes vested,—and the lien therefor attaches, immediately upon the death of decedent, even though, by grace of statute, the remainderman *may* defer the appraisal, computation, and actual payment until a day subsequent to his day of actual enjoyment. Such accrued right may not be affected by the subsequent adoption of a treaty giving foreign beneficiaries the rights possessed by citizens of the United States. Welander v. Hoyt, 188—972.

Collateral Inheritance Tax—Instant or Deferred Payment. A

- 11 remainderman, charged with a collateral inheritance tax, may exercise either of two alternative rights in the payment of the tax, viz.: (1) He may, immediately upon the death of decedent or later, cause the property to be appraised, and pay on the *then* value; or (2) he may defer appraisal until he passes into actual enjoyment of the property, and pay on the *then* value Welander v. Hoyt, 188—972.

TELEGRAPHS AND TELEPHONES.

Delayed Delivery—Written Notice of Claim. Written notices of claim for damages because of delayed delivery of messages must show on their face that they make claim *on behalf of plaintiff*. (Sec. 2164, Code, 1897.) Steil-Hahn Co. v. Western Union Tel. Co., 188—707.

TORTS.

Persons Liable—Lawful Act—Unintended Effect. The doing of an act which is, in itself, perfectly lawful will not render one liable as for a tort, simply because the unintended effect of such act is to assist or enable another person to do such wrong. Konecny v. Hohenschuh, 188—1075.

TRIAL. See CARRIERS, 1, 2; COUNTIES; COURTS; DEPOSITIONS; INSURANCE, 8-17; WITNESSES, 6.

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METHOD OF TRIAL.

Waiver of Trial at Law. Permitting law issues, without objection, to be tried along with equitable issues, is a waiver of trial by jury. *Curtis & Barker v. Central Univ. of Iowa*, 188—300.

COURSE AND CONDUCT IN GENERAL.

Argument—Opening and Closing. Defendant has the right to open and close the argument, when defendant (1) confesses and (2) pleads affirmative avoidance, and plaintiff (1) denies and (2) pleads estoppel. *City Bank v. Alcorn*, 188—592.

Unsuccessful Motion for Directed Verdict—Nonwaiver. The sufficiency of the evidence to sustain the verdict may be raised (a) in requested instructions, or (b) in a motion for a new trial, even though the complaining party unsuccessfully moved for a directed verdict at the close of plaintiff's evidence, and did not repeat the motion at the close of all the evidence. *Willis v. Schertz*, 188—712.

EVIDENCE.

Conflicting *Res Gestae*—Effect. Evidence which is part of the *res gestae* may stand in the record for what it is worth, even though, after its introduction, the opposite party introduces *res gestae* which are prior in time to the first, and inconsistent therewith. *Stukas v. Warfield-Pratt-Howell Co.*, 188—878.

Admissions Contradictory of Defense. An admission by a defendant contradictory of his pleaded defense may very properly be considered in weighing the truthfulness of his defense, and the court may instruct accordingly. *First Nat. Bank v. Patterson*, 188—1237.

ARGUMENTS AND CONDUCT OF COUNSEL.

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Argument—Reading Extracts from Testimony. Extracts from
6 the evidence of witnesses may be read to the jury. *Willis v. Schertz*, 188—712.

Permissible Argument. Record reviewed, and *held* that argu-
7 ment was within the record. *Butkovitch v. Centerville Block Coal Co.*, 188—1176.

Permissible Argument. Argument will not necessarily be con-
8 demned because couched in the form of forcible figures of speech. *Bohen v. North American L. Ins. Co.*, 188—1349.

TAKING CASE FROM JURY.

Disputed Fact Issue—Directed Verdict. Verdict must not be di-
9 rected when the evidence on a material issue is fairly in dispute. *Fish v. White*, 188—57.

INSTRUCTIONS—PROVINCE OF COURT AND JURY.

Assumption of Fact. An assumption by the court of the truth of
10 an undisputed fact is proper. *State v. Carey*, 188—1308.

Weight of Testimony. The jury may be directed, in weighing
11 testimony of statements of a deceased person, to give due consideration to the fact that it is incapable of contradiction. *Bohen v. North American L. Ins. Co.*, 188—1349.

INSTRUCTIONS—NECESSITY AND SUBJECT-MATTER.

Separate Submission of Issue as to Joint Defendants. Issues as
12 to joint defendants charged with negligence may be separately submitted. *Arnett v. Illinois Cent. R. Co.*, 188—540.

INSTRUCTIONS—FORM, REQUISITES, AND SUFFICIENCY.

Pleadings Control. Error may not be predicated on lack of
13 clearness in instructions, when they are fully as broad as the pleadings, and are in harmony with the statements of counsel to the court. So held where the pleading and coun-

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sel's statements to the court rested the question of negligence on the *original* setting of a pole, and not on its subsequent *maintenance*. Eason v. Des Moines Elec. Co., 188—43.

Correct But Not Explicit. Lack of explicitness in a correct instruction is waived by failure to request a more explicit one. Wagner v. Kloster, 188—174.

Contradictory Instructions. Instructions are not contradictory simply because they separately and independently present plaintiff's theory of the facts and defendant's defensive matter thereto. Fletcher v. Ketcham, 188—340.

Combining Defense and Avoidance. Conflict does not necessarily result from presenting defendant's defense and plaintiff's avoidance thereof in one and the same instruction. City Bank v. Alcorn, 188—592.

INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Application to Facts of Case. Instructions not applicable to the evidence are erroneous. So held where the court directed the jury to consider the adulterous relations between the parties during a time when no such relations were shown. Jones v. Spencer, 188—94.

Inapplicable Instructions. Instructions on a theory without support in the evidence are properly refused. So held on the issue of alteration in a promissory note. First Nat. Bank v. Patterson, 188—1237.

INSTRUCTIONS—OBJECTIONS AND EXCEPTIONS.

Necessity for Evidence of Fact. An objection based upon an alleged fact will be disregarded, when the record is barren of any evidence of such fact. State v. Cartwright, 188—579.

Sufficiency. An exception to an instruction on the ground that "It is not a correct statement of the law" is wholly insufficient. (Sec. 3705-a, Code Supp., 1913.) Willis v. Schertz, 188—712.

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General Objections Disregarded. Objections to instructions will
21 be disregarded, unless they specify the part of the instruction objected to and the *grounds* of the objection. (37 G. A., Ch. 24.) *Anthony v. O'Brien*, 188—802.

Waiving Objections. Objections to instructions are waived by
22 failure to submit them to the court and secure ruling thereon. (37 G. A., Ch. 24.) *Anthony v. O'Brien*, 188—802.

Refusal—Assignment of Grounds—Sufficiency. A party may not
23 rely on the mere refusal to give an instruction. He must go further, and *specify the grounds* on which he predicates error in such refusal. (37 G. A., Ch. 24.) *Anthony v. O'Brien*, 188—802.

Exceptions to Instructions—Sufficiency. Exceptions reviewed,
24 and held amply sufficient to present the point argued as grounds for new trial. *Harper & Ward v. Kurtz*, 188—1047.

Waiver of Exceptions. If the court be wrong in his instructions, and persist in the error by overruling counsel's
25 specific exceptions, counsel may then adapt himself to the erroneous position of the court, and, by requested instructions, seek, so far as possible, to minimize the erroneous position of the court. *By so doing, counsel does not waive his overruled exceptions.* *Harper & Ward v. Kurtz*, 188—1047.

INSTRUCTIONS—CONSTRUCTION AND OPERATION.

Erroneous Instruction Eliminated by Jury Findings. An erroneous
26 ous instruction is without prejudice, when it affirmatively appears that the findings of the jury wholly eliminate the hypothesis upon which the erroneous instruction was given. So held where the instruction was erroneous because not applicable to the pleadings, and because wrongly placing the burden of proof. *Shea v. Biddle Impr. Co.*, 188—952.

TRUSTS. See LIMITATION OF ACTIONS, 1.

Merger of Legal and Equitable Title. Legal and equitable
1 titles in the same trust property will not be held to merge,
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when to so hold would nullify the purpose of the parties and destroy the power to create conditions or reservations. *Curtis & Barker v. Central Univ. of Iowa*, 188—300.

Cy Pres—Inapplicability. A donee who has deliberately deprived himself of the power to carry out the conditions attached to donor's gift may not take cover under the doctrine of cy pres—conceding, *arguendo*, that such doctrine prevails in this state. *Curtis & Barker v. Central Univ. of Iowa*, 188—300.

Consideration Paid by Non-Title Holder. One who holds the legal title to land which has been paid for by another, holds as trustee of the latter, no gift being intended. *Tamango v. Freiberg*, 188—788.

Evidence—Insufficiency. Evidence held insufficient to establish a trust in real property. *Primrose v. Primrose*, 188—1119.

VENDOR AND PURCHASER. See MORTGAGES, 4, 5; SALES.

Contract of Sale (?) or Option (?) Instrument analyzed, and in connection with attending circumstances, held to constitute a contract of sale, even though uniformly designated as an *option*. *Gompert v. Frost*, 188—1039.

VENUE.

Rights of Nonresident Third Party. In an action to redeem from a foreclosure sale, wherein a third party, who was a nonresident of the county, was brought into an auxiliary accounting, where it appeared that plaintiff was not entitled to redeem, such third party had a right to demand that he be dismissed as a party, on the ground that the action for accounting was purely a personal suit, and that he had a right to have it tried in the county of his residence. *Korf v. Howerton*, 188—120.

WATERS AND WATERCOURSES. See DRAINS.

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WILLS

Waste of Subterranean Percolating Waters. Injunction will lie

- 1 to restrain the *unnecessary waste* of subterranean percolating waters, to the injury of a lower landowner; especially is this so where the lower proprietor needed such waters for *human* consumption. So held where the upper proprietor, who was drawing off the water through a syphon, was required to reduce the size of his pipe, and to construct tanks to hold the water for hog wallows. *DeBok v. Doak*, 188—597.

Uncertain Record. Record reviewed, and held too uncertain to

- 2 justify the court in reviewing the findings of fact by the trial court. *Schuster v. Miller*, 188—704.

WILLS. See JUDGMENT, 1.

TESTAMENTARY CAPACITY.

Sanity—Burden of Proof. Sanity is presumed. Burden of

- 1 proof to show the contrary rests on him who so alleges. *Kerkhoff v. Monkemeier*, 188—103.

Evidence. Evidence reviewed, and held insufficient to support

- 2 a verdict of mental incompetency to execute a will. In re *Estate of Bresler*, 188—458; In re *Estate of Gormly*, 188—467.

Mental Competency—Inequitableness. Apparent inequitableness

- 3 in a will may wholly disappear when due consideration is given to the history of the family: (1) The relative amount which each child has contributed in labor or otherwise to testator's property; (2) the amount of advancements to pretermitted children; (3) and the relative financial condition of each child. In re *Estate of Fousek*, 188—700.

CONTRACTS TO DEVISE OR BEQUEATH.

Contract in Consideration of Dismissal of Contest—Construction.

- 4 An agreement between a mother, beneficiary under a will, and a contestant of the will, that, in consideration of the dismissal of the contest, the mother's *estate* shall, at her death, be equally distributed to contestant and others, re-

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fers to the property received by the mother under the will, or the changed form thereof, and will be enforced accordingly. *Watters v. Prosser*, 188—1346.

UNDUE INFLUENCE OR FRAUD.

Will Contrary to Attempted Influence. Conceding, *arguendo*,

5 that testator was easily influenced by reason of certain delusions, yet undue influence may not be predicated on the fact that testator was advised to make an *unequal* distribution, when an analysis of the will reveals a distribution of his entire estate by a series of devises practically *equal*. *Kerkhoff v. Monkemeier*, 188—103.

PROBATE, ESTABLISHMENT, AND ANNULMENT.

Foreign Probate of Domestic Will. The will of a domiciled resi-

6 dent of this state will not be admitted to probate in this state on a duly authenticated record of probate in a foreign state. (Sec. 3294, Code, 1897.) In re Will of Longshore, 188—743.

Validity of Devise to Alien Enemy. A devise to an alien enemy

7 is valid, but the court will retain jurisdiction over the property until peace is declared. In re Will of Kielsmark, 188—1378.

CONSTRUCTION.

Support of Feeble-Minded Child. A provision in a will, making

8 the support of a feeble-minded person a charge upon land, and, in effect, providing that such support should be on the land, and such as testator had given the child, is construed, and held not to justify a charge against the land equal to what a stranger would exact for such support. *McGuire v. Halloran*, 188—479.

RIGHTS AND LIABILITIES OF DEVISEES.

Admissible to Prove Contract. A will devising a promissory

9 note to the maker is admissible as an item of evidence on the issue whether the note was given on the condition that

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the payment of the annual interest during the lifetime of the payee should work a full discharge of the note. *Herron v. Brinton*, 188—60.

Interest on Legacies. Legacies draw interest from the date of 10 their maturity. *Security Sav. Bank v. Williams*, 188—904.

WITNESSES. See DEPOSITIONS; GRAND JURY.

Competency—Insufficient Objection. An objection to the compe-
1 tency of a witness must specifically state the *facts* which work incompetency. An objection which simply asserts that a witness is "incompetent and unqualified" is quite insufficient to raise any question of competency. *Secor v. Siver*, 188—1126.

Transactions with Deceased—Insufficient Objections. An inter-
2 ested witness may, in an action for damages for fraudulent representations, testify against the administrator of a deceased:

1. As to the description, quality, and value of the several tracts of land which passed in the deal.
2. As to his reliance on the representations.
3. As to the condition in which he found the property which was received from the deceased. *Secor v. Siver*, 188—1126.

Transactions with Deceased—Insufficient Objection. An objec-
3 tion that a witness is incompetent to testify to a personal *transaction* with a deceased does not necessarily raise the point that he is incompetent to testify to a personal *communication* with deceased. *Secor v. Siver*, 188—1126.

Cross-Examination—Unjustifiable Latitude. A cross-examina-
4 tion over matters which have no relevancy whatever to the direct examination, nor to any fact in issue, is wholly unallowable. *Jones v. Spencer*, 188—94.

Cross-Examination—Explanation of What Witness Means. In an
5 action for injury in a mine haulageway, and on the issue whether a state inspector had determined that the haulageway could not, in practice, be maintained at a width of eight

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feet, the inspector may, on cross-examination, testify that, had he made the determination as to the way in question, he would have made it in writing. *Butkovitch v. Centerville Block Coal Co.*, 188—1176.

Instructions in re Credibility. Instructions are properly refused 6 which direct the jury to give the same weight to testimony of witnesses by deposition as to oral testimony of witnesses in open court. *Bohen v. North American L. Ins. Co.*, 188—1849.

WORDS AND PHRASES. See **CONTRACTS**, 9.

“From.” “From” held to exclude the terminus referred to. *City of Dubuque v. Dubuque Elec. Co.*, 188—1192.

WORK AND LABOR. See **EXECUTORS AND ADMINISTRATORS**, 5; **HUSBAND AND WIFE**.

Value. The court may not, ordinarily, assume the value of service, in the absence of evidence bearing thereon. *McGuire v. Halloran*, 188—479.

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